SUPREME COURT

Filed Jan. 8, 1879.

UNITED STATES.

October Term, 1878.

JOHN McMULLEN, *Petitioner*,

vs.

JULIA E. HOFFMAN, Executrix of the Last Will of Lee Hoffman, deceased, *Respondent*.

No. 271.

Brief of Petitioner.

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IN THE

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Petitioner's Brief.

HISTORY OF THE CASE.

For some years prior to 1893 John McMullen, a resident of San Francisco and a citizen of California, was the president and general manager of the San Francisco Bridge Company, a private corporation of California, and Lee Hoffman, a resident of Portland and a citizen of Oregon, was engaged in business under the firm name of Hoffman & Bates. The business of both parties was that of general contract work. In 1887 the City of Portland had under consideration the construction of a new system of water works, and asked for proposals from contractors. McMullen was one of those who responded, and he bid successfully on some

part of the work. The enterprise was abandoned for the time being, but in contemplation of its renewal Hoffman then proposed to McMullen that when it came up again they should bid together on the work, and the subject was frequently discussed between them from that time until December, 1892. (Record, page 221.)

At this latter time the City of Portland again took up the project and advertised for proposals to be submitted March 1, 1893, separately on various branches of the work, the whole contemplating the bringing of water from a stream in the Cascade Mountains, known as Bull Run, to the city, a distance of some thirty miles, and there connecting with a general system for distribution. McMullen and Hoffman renewed their negotiations for joint action in bidding on this work. (See McMullen's testimony, record, pp. 210 et seq., 222 et seq.; Bush, p. 264 et seq.; defendant's exhibits A, B, C, D, E, Z, A2, B2, C2, D2.)

A few days prior to March 1, McMullen came to Portland from San Francisco, and he and Hoffman were engaged in the preparation of bids on the work. Bids were submitted by both of them—by McMullen in the name of the San Francisco Bridge Company, and by Hoffman in that of Hoffman & Bates—on all the parcels of work separately offered. On the item of "Manufacturing and Laying Steel Pipe from Head Works to Mt. Tabor," a bid submitted in the name of Hoffman & Bates was found to be the lowest, and "Hoffman & Bates" were found by the "Water Committee" of the City of Portland to be entitled to a contract for this work. On March 6, 1893, McMullen and Hoffman entered into this contract (record, p. 492):

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman & Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mt. Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the Water Committee of the City of Portland for doing such work, the contract having been awarded to said Hoffman & Bates on said bid.

"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom;

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same manner be shared and borne by said parties equally share and share alike.

"Witness our hands and seals this sixth day of March, A. D. 1893.

"JOHN McMULLEN. (Seal.)
"LEE HOFFMAN. (Seal.)

"In presence of:
"P. L. Willis,
"R. E. Sewall."

In reciting the transactions which antedate the execution of this contract, and in making reference to other branches of the work than that immediately involved in this suit, counsel for the petitioner do not wish to be understood as conceding their materiality on the appeal. The narrative is given because the matters appear in the record, and in order that the Court may have a prospective view of the points which are in contest between the parties. The petitioner contends that these matters cannot influence his right of recovery.

On March 10 the Water Committee of the City of Portland entered into a written contract with Hoffman for the execution of the work referred to in the agreement above set forth, the terms of which are embodied in a stipulation of facts herein as follows (record, p. 118):

"That on the tenth day of March, 1893, a contract was entered into between the said Hoffman and the water committee, Hoffman acting in the name of Hoffman & Bates, whereby said Hoffman undertook and promised to furnish all the material and labor for constructing and completing said pipe line from the head works at Bull Run to Mt. Tabor, according to certain specifications which were attached to and made a part of said contract, and to turn the same over completed to the City of Portland, in consideration whereof the City of Portland agreed to pay the sum of $465,667.00. The city, however, reserved the right to make any changes in the specifications it thought proper, the pay for the work to be increased or diminished as the change increased or diminished the cost of the work. Payments were to be made as the work progressed, monthly estimates to be made by the city engineer and

ninety per cent. of the amount earned under the contract in any one month was to be paid by the twentieth day of the following month. It was further provided by the said specifications that said Hoffman should turn said work over to the city when completed, and should keep the same in thorough repair and guarantee the city against all loss, costs or damages from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe, and in case said Hoffman failed in this, the city reserved the right to do the work and deduct the costs from the money retained in the hands of the city, and that when the said work was finally accepted the whole amount then due for said work should be paid."

Outside of the written contract between McMullen and Hoffman, it was agreed by them that Hoffman should act as superintendent of the work to be performed by them, and thereupon they began the prosecution of the work, Hoffman on the ground and McMullen contributing towards its advancement from San Francisco. Before estimates of sufficient amount to carry the work began to be received from the city, both parties were required to make advances of money, and this condition continued through the summer of 1893. Hoffman's advances were larger than those of McMullen, the latter asserting that he was so embarrassed by the financial disturbances of that year that he was unable to contribute towards the work in equal proportion with Hoffman. This situation of affairs provoked remonstrances from Hoffman and demands upon McMullen for the payment of his proper part of the necessary advances. Several letters were interchanged between them on the subject, and finally Hoff-

man wrote McMullen the following letter (record, p. 579):

"Portland, September 11, 1893.

"J. McMullen, Esq., San Francisco.

"Dear Sir:—The water works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the twentieth of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop, just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so had to keep on. Our estimate is $66,000.00, and they have $40,000.00 that they are going to divide equally among all the contractors, so we will get about $20,000, and after paying Wolff & Zwicker and Cook and Kiernan their pro ratio, we will have about $9,000.00 left to pay about a $22,500 pay-roll, station men included, besides iron gates and supplies besides this month. Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money, or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in but you can see the necessity of having money. If you will furnish $10,000 by the twentieth, I will carry on the contract the same way I did before, but this amount I must insist on your furnishing or

you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day.

"Yours very truly,

"LEE HOFFMAN."

McMullen answered this letter by the following one (record, p. 558):

"San Francisco, Cal., September 14, 1893.

"Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

"Dear Sir: Your letter of September 11th at hand and noted.

"My idea of the proper solution of the financial difficulty of the pipe line contract (assuming that the committee will be unable to sell more bonds, and that they will be out of cash, which we do not understand is a certain thing yet, as we understand that they have extended the option of purchaser to October 1st), would be: to deduct the board bill from the pay-roll, which would leave the latter in the neighborhood of $15,000.00; apply the $9,000.00 to liquidate this; take, say

$10,000.00 in bonds, get a loan of say 75 cents on the dollar on this amount of bonds and liquidate balance of pay-roll; stand off supply accounts entirely, as it is a perfectly fair proposition so to do in view of the fact that the city has not paid you, and no reasonable business man would object. If you have freight bills or contract obligations to meet, which could not be stood off, would advise taking further bonds and hypothecating them as above suggested, and meet such obligations. As I understand contract Wolff & Zwicker and Cook and Kiernan they can only demand pay as we receive it from the city, and not otherwise. There is not any doubt but that ultimately the city will succeed in selling these bonds, and probably in sixty or ninety days, at which time you could turn the bonds into cash; have it so understood with the water committee that the bonds you thus accept temporarily shall be turned in on the first sale of bonds. I think that with so good a collateral as these bonds there should be no trouble in raising money enough there to pay the balance of this year's labor. If there should be difficulty in this, you could shut down the work at the first of October, at which time the last option given on the bonds will expire. The difference between the interest that the bonds would bear and what you have to pay for money could not amount to a very considerable sum for the limited quantity that would be required to take care of the labor account for a month or two. I have not the slightest doubt but what these bonds will be marketable shortly, and trust that the committee will yet realize by the first of October.

"My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you $10,000.00 before the 20th of this

month. Neither can I accede to your proposition that I should withdraw from and surrender my interest in this contract. Neither have I ever intimated in any way that I would do so, as you imply in your letter, except in my letter to you of March 14, 1893; to the proposition contained in said letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition.

"I think, Lee, that in your letter you considerably exaggerate the financial difficulties. I do not believe it will be long until the Committee will realize on their bonds, and for the inconsiderable sum it will require to take care of the labor, outside of the board account, I believe that you can readily secure a loan of 75 or 80 cents on the dollar for a block of these bonds, which the committee stand ready to give you on account of the contract. Neither do I believe that you would stand any loss on these bonds, as I think they will shortly be at a premium.

"Any reasonable or equitable arrangement that you may make, in this or any other direction for money, will meet my approval, and I will cheerfully bear my proportion of the interest, and for what additional money you may have in the contract more than I have contributed, I am prepared to pay any reasonable interest.

"It looks to me very much as if, should the committee be in funds again, the job would be on velvet by the end of this year; that is, that your receipts would be quite up to your disbursements. I would be glad to know if you agree with me in this.

"I have heretofore offered you the credit of the San Francisco Bridge Company to assist you in making any

financial arrangement that you might desire, if the same would be of any value to you.

"I trust that things will look brighter shortly, and will be glad to hear from you further on this subject.

"Yours truly,

"J. McMULLEN."

Hoffman's reply to this letter was the following (record, p. 580):

"Portland, September 16, 1893.

"J. McMullen, Esq., San Francisco.

"Dear Sir:—Yours of the fourteenth at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, $10,000, by the 20th of this month, I shall not recognize you in this contract after that date and shall make such arrangements as I see fit. If the San Francisco Br. Co. has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the

money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am

"Yours very truly,

"LEE HOFFMAN."

McMullen made this response (record, p. 560):

"San Francisco, Cal., September 18, 1893.

"Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

"Dear Sir: Yours of September 16th at hand and noted.

"Before receiving the same, Captain Taylor, of the Risdon Iron Works, had showed me a letter he had received this morning from Mr. Failing, chairman of the water committee, saying that they had sold another $100,000.00 worth of bonds, and that the money would be there not later than the 30th—probably several days sooner.

"I should have supposed that you, too, would have been advised of this fact, as his letter was also written on the sixteenth.

"This will undoubtedly make the financial situation very much easier than you anticipated. If you get an estimate of $66,000.00, I suppose about one-half of it goes to Wolff & Zwicker and Cook and Kiernan on their sub-contracts; perhaps a little more; the other half of it should be abundant to liquidate your $22,500 pay-roll (in which latter I understand there is included the board account which must amount to $6,000.00 or $7,000.00 which, according to my ideas of business need not neces-

sarily always be cash every month), but assuming that it is cash, it would still leave you in the neighborhood of $10,000.00 to pay for other supplies with, or to reduce the amount of money that you have invested in the contract.

"You say that you have done business for many years to suit yourself, and will keep on doing so. Now, Lee, I have never made any reflections on your methods. Several months ago, before we started on this work, I told you my ideas of how to conduct it and, with all due respect, I still think I was pretty near right in it. I think you should have made everybody who furnished any supplies for that contract wait for their pay until we got it out of the job; that is, until those supplies were allowed for in the estimate. I have a job here, amounting to a quarter of a million dollars, and every subcontract on it is made on exactly these lines, and you know very well that all large works, works of magnitude, are conducted on these lines. When a party having a contract has a reasonable credit, there is no trouble in placing subcontracts and supply purchases on this basis, and we recognize the fact that your firm had an excellent credit. You elected to differently. You elected to make contracts, and allow people to draw on you when the goods were shipped. Now, of course, if you pay for everything in advance, it may take $100,000.00 to run that job, but it does not follow that the job could not have been successfully run on $10,000.00 or $15,000.00.

"I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do thus and so. You must understand that nothing that you can do will change my

rights in the premises, and if you attempt anything of the kind you will only injure yourself. If I were in a 'kicking' mood and wanted to find fault I might have as much reason with some things that you have done in connection with that work as you have to upbraid me for my shortcomings, but I have no desire to recriminate.

"I trust that on more mature reflection, and with the better outlook from the financial horizon, you will see the folly of the proposition that you put forth in your letter.

"I assure you, Lee, that you will have no occasion when you get through to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation.

"Yours truly,

"J. McMULLEN."

After the interchange of these letters communication seems to have been suspended between the parties in regard to the prosecution of the work, except that McMullen visited Portland and conferred with Hoffman in regard to the work (McMullen's testimony, record, pp. 215-217, 224), and inspected the work at divers times afterwards. (McMullen's testimony, record, p. 168; Bush, p. 273, 291.)

After September 20, 1893, Hoffman, assuming to act alone, carried the work to a completion, and, as it eventually was ascertained, according to the books kept by himself, a net profit of $105,039.59 was made, besides which there were some disallowed claims (record, p. 119), and some accumulation of merchandise and equipment.

On December 1, 1894, the work was substantially completed, and a few days later McMullen, who had no account of the operations, demanded of Hoffman a statement of the result and payment of half of the net profits. Hoffman denied the application, and on April 19, 1895, this suit was brought in the Circuit Court for the District of Oregon.

THE BILL.

It is alleged in the bill (record, p. 4) that prior to March 6, 1893, the City of Portland, acting through its Water Committee, advertised for proposals for the construction of a system of water works; that before the time specified for the acceptance of bids it had been agreed between Hoffman and McMullen that they would jointly endeavor to obtain a contract for the work, or some part of it, and that in their joint interest a bid should be put in for the construction of all, or portions, of said work; that if they were successful they would share equally in such contract as resulted from their bid; that pursuant to said agreement, and in the joint interest of the parties, a bid was put in by Hoffman in the firm name of Hoffman & Bates, for the manufacture and laying of steel pipe from the head works of the water system to Mt. Tabor, which bid was found to be the lowest bid for this work, and the defendant was declared to be the successful bidder and entitled to a contract with the City of Portland; that thereupon the parties entered into the contract on the sixth of March (hereinabove set out); that on the tenth of March, 1893, Hoffman, acting in the name of Hoffman & Bates, and in the joint interest of himself and

McMullen, entered into an agreement with the City of Portland (above mentioned); that upon the execution of the contract with the city Hoffman and McMullen proceeded with the performance of the work, and on or about the first day of January, 1895, completed the same and delivered it to the City of Portland, which received and accepted the work, subject to the obligations imposed by the contract as to the maintenance of the pipe for six months after the date of acceptance; that towards the execution of said work McMullen had contributed valuable services of himself personally and of his employes and agents, and had contributed money and property towards said work to the value of $2,414.46, or thereabouts, and had been at all times ready and willing to render, and had rendered, all services in the conduct and management of the business requested of him by Hoffman, and had been ready and willing to render any other service required or desired of him towards the prosecution of the work; that Hoffman had contributed services and advanced money and supplied equipment for the prosecution of the work, but the amount of the advances and equipment and the value of his services McMullen did not know and could not state; that other work had been done by the parties towards the bringing of Bull Run water to Portland in connection with their principal contract; that the City of Portland had paid ninety per cent. of the contract price for the work done under the contract, and was withholding the additional ten per cent. until compliance was made with the guaranty in the contract as to keeping the pipe in repair for six months from the date of the completion of the contract; that complainant was informed, and therefore alleged the truth to be, that Hoffman had been paid in large part, if not

wholly, the cost and value of this additional work; that various modifications had been made in the principal work disarranging the contract price, but complainant could not state just what they were; that at the time the contract of March 6th was entered into it was understood and agreed between the parties thereto that within the State of Oregon Hoffman was to have and exercise personal superintendence of the work contemplated by the contract, was to manage all matters connected therewith, was to receive from the city all moneys to be paid, and disburse the same as might be required; that Hoffman did assume and exercise such superintendence and did make practically all purchases, employ all labor, and exercise general management within the State of Oregon over all matters connected with the work; that he had received all moneys paid by the city and had disbursed the same as far as needed, and that he had kept and then had in his possession full records and books of account; that complainant had during all of the time when said work was being prosecuted been a resident of San Francisco, and, with the exception of occasional visits to Portland and casual inspections of the work as it progressed, he had had no oversight of the work, and had kept no book of account; that he had no knowledge or information touching the amount or character of the work performed, outside of the contract of March 10th, or the value thereof, nor of the moneys which had been received or disbursed, but that all such matters would be shown by the books kept by Hoffman; that Hoffman had in his possession the several monthly estimates rendered by the engineer of the city, and that the final estimate would show all money earned and paid for the work performed for the city; that on or about the fourth of

December, 1894, at the City of Portland, complainant had requested of Hoffman an accounting of the transactions of the partnership, but that Hoffman had refused him any accounting, and had denied him access to the books kept by himself touching the work; that the complainant believed the city had already paid to Hoffman a sum of money exceeding by $35,000.00, or more, all expenses and liabilities which Hoffman had made or incurred on account of the work, so that this sum stood as a profit on the contract, and complainant's part of the same should be paid over to him; that complainant believed the total profit made by himself and Hoffman upon the work done for the City of Portland was $80,000.00, or more, one-half of which belonged and should be paid to him; that in addition to the direct profit made in money, Hoffman and complainant had other assets consisting of plant, tools and other personal property to the value of $5,000.00, or thereabouts.

The relief sought by the bill was the appointment of a receiver to carry to final execution the work, and to receive from the city the retained percentage, to sell the partnership property at the completion of the work and reduce it to money, an accounting from Hoffman of the affairs and earnings of the partnership, and a payment of one-half of the net profits found to have been made on the partnership enterprise. The bill also prayed for the allowance of a restraining order inhibiting Hoffman from drawing from the City of Portland the retained percentage or from making any assignment of his right to the same, and from making any sale or other disposition of the remaining assets. Such application, including the prayer for the appointment of a receiver, was made to the Court on April 19, 1895,

and a restraining order was granted with an order to show cause. (Record, p. 19.) Upon the hearing the Court refused to appoint a receiver, and vacated the restraining order (record, p. 43), but subsequently modified its action so as to continue in force the inhibition against Hoffman's drawing from the city the retained percentage, or making any assignment of his interest therein. (Record, p. 46.)

THE ANSWER.

On June 3, 1895, Hoffman filed his answer (record, p. 28), in which he admitted that prior to the sixth of March the City of Portland had advertised for bids for the construction of its water system; that prior to the time prescribed for the reception of bids it had been agreed between him and McMullen that they would endeavor to obtain the contract for this work, or some part of it; but he denied that it was agreed that they would jointly endeavor to get such contract, but that, on the contrary, the agreement was that they should not act jointly in the matter, but severally, Hoffman acting in the name of Hoffman & Bates, and McMullen in the name of the San Francisco Bridge Company. Hoffman denied that it was agreed between McMullen and himself that bids should be put in for the construction of said water works, or for certain portions of them, but that it was mutually and secretly agreed between himself and McMullen before the bids were filed with the water committee that McMullen should make and file with the committee several bids for portions of the work in

the name of the San Francisco Bridge Company, and Hoffman should make and file several bids for the same portions of the work in the name of Hoffman & Bates, and that the bids should be made so as not to compete with each other, but to avoid competition; that it was further agreed, in order to effect the purpose of the parties and get a contract for the work at as high a figure as possible, that both parties, before said bids were filed, should examine the same and know their contents; that pursuant to such understanding McMullen did submit to Hoffman for examination and approval the bids which he proposed to file, and Hoffman submitted to McMullen for approval the bids which he proposed to file; that Hoffman disapproved of McMullen's bid, and required it to be raised by $98,000 more than McMullen's proposed bid, which was done, and that McMullen disapproved of Hoffman's bid and required it to be reduced by $13,000.00 below the sum which Hoffman had proposed bidding, and that the bids containing these new amounts were then filed, and Hoffman mutually agreed to share the profits and loss in the execution and performance of the contract; [that for the purpose of enhancing their profits it was further secretly agreed and understood, and they so contracted, that they should apparently compete for said work, but would not do so in fact;] that in inviting bids for the work it was divided by the Water Committee into distinct classes, and bids were taken on each branch of the work; that Hoffman and McMullen bid for various branches of work offered in apparent, but not actual, competition; that the figures stated in their respective bids were arranged so as to accomplish their agreement; that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be low-

est, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for the pipes should be lowest, and they should be accepted by the city, and the bid upon the last work by Hoffman & Bates should be next lowest, McMullen would decline to accept the work, and would thereby induce the city to accept Hoffman's higher bid, and the same course should be pursued with all other portions of the work upon which both of said parties bid; that it was one of the conditions of the bidding that each bid should be accompanied by a certified check equal to five per cent. of the amount of the bid, and that both Hoffman and McMullen deposited such checks with each of their bids; [that as soon as the bid of Hoffman & Bates for the manufacturing and laying of the pipe was accepted by the Water Committee, and for the purpose of carrying into effect the contract and understanding arrived at between Hoffman and McMullen, they entered into the agreement of the sixth of March; that each of the bids submitted by Hoffman and McMullen was in their joint interest, but Hoffman denied that one single bid was made in their joint interest.]

Hoffman admitted that pursuant to the agreement between himself and McMullen and in their joint interest, a bid was put in by him in the name of Hoffman & Bates for the manufacture and laying of steel pipes, which bid was found to be the lowest, and that upon the same a contract was awarded him; that in evidence of the interest between McMullen and himself in said bid, and the contract with the Water Committee to be entered into upon the same, and the work to be done thereunder, on March 6th he and McMullen entered into the written agreement mentioned by him, and that

said contract was a part of, and was made to aid in carrying out, the unlawful combination and confederacy entered into between himself and McMullen, as previously set forth in his answer. He admitted that on March 10th he entered into a contract with the City of Portland in pursuance of his bid, the same as was charged in the bill; he denied that upon the execution of the contract McMullen and himself had proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any time, had completed the same, but alleged that he alone proceeded with the work and completed the same, so that it was delivered to and accepted by the city, subject to the stipulation for six months' probation. He denied that towards the execution of the work McMullen had contributed valuable, or any, services of himself personally, or of any employe or agent, at any point, or that McMullen had contributed money or property, or anything else, towards the prosecution of said work to the value of $2,414.46, or any amount, and denied that McMullen had at all times, or at any time, been ready or willing to render, or had rendered, any service in the conduct or management of the business, or any service which might have been required or desired of him, but alleged that as soon as the agreement of March 6th had been signed McMullen left the State of Oregon, and thereafter neglected and refused to render any aid, or to assist him in any way, in carrying out the contract with the City of Portland. He charged that he had been required to give to the City of Portland a bond with sureties in the sum of $140,000, and although he had requested of McMullen a portion of the sureties, McMullen refused to provide them, or to aid him in any way in procuring the sureties; that it was

necessary to raise a large amount of money from time to time in the execution of his contract for the purchase of material and supplies and the payment of labor, and that he was without necessary means or resources to procure the same; that he had continuously apprised McMullen from time to time up to about September 16, 1893, of his circumstances and financial condition, and requested McMullen to furnish one-half of the money necessary for the successful prosecution of the work, but that McMullen had positively declined and refused to furnish any money to aid in the prosecution of the work, claiming that he had no money to put into the business, and by reason of said failure and refusal of McMullen to perform his part of the agreement of partnership, Hoffman, or or about September 16th, dissolved the same, and informed McMullen of said dissolution and of the termination of the partnership agreement; that McMullen had assented to the dissolution, and that thereupon the co-partnership was dissolved and terminated.

Hoffman further charged in his answer that McMullen entirely refused to furnish a surety upon the bond required of him, and refused to furnish his share of the money necessary to carry on the work, but complained of him (Hoffman) because he did not refuse to pay supply and other bills of expense incurred in carrying on the work, and had suggested that Hoffman should hold the creditors off, although Hoffman was under contract to pay for his supplies and labor at the end of each month, as McMullen well knew.

[It was charged that McMullen was desirous of securing other portions of the work, especially that of manufacturing and laying submerged pipe across the

Willamette river, and that he had proposed to Hoffman to devise some means to get the work against competing bidders; that they should pool their bids and take in the secretary of the Water Committee, and have him withhold certain bids until after the letting; that McMullen had also suggested the plan of a combination with two certain parties engaged in the manufacture of cast iron.]

It was further charged that on the sixteenth day of September, 1893, Hoffman had advanced of his own funds on account of the work $15,990, and that on the twenty-fifth day of September bills on said work to the amount of $22,500.00 would fall due; that on the eleventh day of September Hoffman had been notified by the Water Committee that it was without funds to pay the August estimates, and did not know when money for that purpose could be secured; that in order to meet the payments which would mature on September 25th, Hoffman had secured upon his own collateral and at considerable loss and sacrifice $14,000.00, which would not have been necessary if McMullen had not refused to provide the money he had agreed to furnish. That Hoffman, at the request of McMullen, had purchased a certain plant at Seattle from the San Francisco Bridge Company, and bills for said plant, as well as for certain other equipment, had been rendered by that company; that Hoffman had tendered to said company payment for such bills, but that the company had refused to accept the same. Hoffman denied that he and McMullen had done other work in bringing water to Portland in connection with the principal contract; he admitted that 90 per cent. of the price under the principal contract had been paid him by the City of Portland, and

that ten per cent. was withheld during the six months' probation, and admitted that he had been paid a large part of the cost and value of other work performed for the city, but not the whole of it; he admitted that variations had been made in the specifications for all of said work, disturbing the contract prices, but said he could not state just what they were, nor their amount.

He admitted that when the contract of March 6th was entered into it was agreed between him and McMullen that he was to have within the State of Oregon personal superintendence and management of all the work done for the City of Portland, and was to receive all moneys paid by the city and disburse the same as required; he alleged that it was also agreed between himself and McMullen that he was to have and receive a salary for his services as such superintendent, and that a thousand dollars a month was reasonable compensation; he admitted that he had assumed and exercised personal superintendence of the work and had made all purchases, except that of a certain hydraulic punch and shears, which had been ordered by him and paid for by the San Francisco Bridge Company; he admitted that he had employed all the labor and exercised general management within the State of Oregon over the work, had received all moneys paid by the City of Portland and disbursed the same, as far as they had been disbursed, and that he had full records and books of account of all work done, material purchased, labor employed, expenses incurred, and moneys paid out; he admitted that McMullen was, during all of the time said work was being prosecuted, a resident of San Francisco, and, with the exception of occasional visits to the City of Portland and casual inspections of the

work as it progressed, had had no oversight of the work, but denied any knowledge as to whether McMullen had no book of account or record of the work, and denied any knowledge as to what McMullen might have known in regard to other work done for the city, but admitted that his own records and books fully showed the status of such work; he admitted that he had the several monthly estimates rendered by the engineer of the water committee, but denied that the last estimate showed all of the money earned or paid by the city; he admitted that on or about December 4, 1894, McMullen had demanded of him an inspection of his books and an accounting, and admitted that he had refused to render any account, or to allow McMullen to inspect his books, or any record, touching the work; he admitted that the moneys already paid to him by the City of Portland exceeded by $35,000.00, or more, all expenses or liabilities which he had made or incurred on account of work done for the city, and that the same was expected profit on the contract. He denied that any part of these moneys ought to be paid to McMullen; he denied that he had converted all, or any, of said money to his own use, but admitted that he had refused, and still refused, to render to McMullen any account or payment, and he denied that McMullen had any interest in said work or its proceeds, as a partner; he denied that the profit made by himself and McMullen upon the work done for the city was $80,000.00, or more, or any sum, and denied that McMullen had done any work for the city, but alleged that the only thing McMullen had done was to request him to go down on the Sound for a small remnant of a plant owned by the San Francisco Bridge Company, worth no more than $1,062.82, and denied that one-half of $80,000.00, or any part thereof,

belonged to, or should be paid to, McMullen; he denied that the assets of the partnership alleged by McMullen, in addition to the moneys paid and yet to be paid, consisted of plant, tools, or other property, to the value of $5,000.00, or any sum. He admitted that he still had on hand a part of the plant with which the work had been done, but alleged the same was of little value, although he could not state its exact value. He denied that any receiver should be appointed, or that McMullen was entitled to any relief under his bill.

A number of exceptions were filed by the complainant to this answer (record, pp. 48, 51), which, after argument, were allowed in part and disallowed in greater part. The matter to which the exceptions were allowed is indicated above by bracket enclosures. In passing on the exceptions, the trial Court (Bellinger, J.) rendered a written opinion, which is found on page 58 of the record.

On July 21, 1895, Hoffman died, and on August 26th McMullen filed a bill of revivor against the respondent herein (record, p. 71), which was allowed on September 25th (record, p. 79), and thereupon McMullen filed amendments to his bill (record, p. 81), and a general replication (record, p. 85). The cause was referred to an examiner (record, p. 86), came on for final hearing before the Court on March 2, 1896 (record, p. 91), and on June 23 the Court rendered its decree (record, p. 91), given below:

FINDINGS AND DECREE.

"This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day; and on this twenty-third day of June, 1896, the Court, having duly considered said pleadings and the evidence introduced in support thereof and the arguments of counsel thereon, finds therefrom as follows, to-wit:

"1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the City of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mt. Tabor on a system of water works then about to be constructed by the said City of Portland, and for furnishing material therefor, the price to be paid for the same being $465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom; and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of

water works, the profits and losses of such other work should be shared by them jointly.

"2. That on the tenth day of March, 1893, a contract was entered into by and between the City of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said City of Portland had the right at any time during the progress of the work to make necessary modifications of the plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

"3. That the complainant at the time of entering into said contract was a resident of the City of San Francisco, State of California, and said Lee Hoffman was a resident of the said City of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

"4. That upon the execution of the contract above mentioned between said Lee Hoffman and the City of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the City of Portland, and to furnish materials therefor, said contract having been modified in divers particulars during its progress, the effect

whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of $509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of $458,842.70, and the sum of $50,982.52 was withheld by said City of Portland, and less the sum of $18,627.17 paid to Wolff, Zwicker & Buehner, as a debt owing from the complainant and defendant, as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and the said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and thereby claim to have earned the sum of $31,073.49, of which the City of Portland has allowed the sum of $14,112.24, and has disallowed the sum of $16,961.25. Of said sum of $14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the twentieth day of December, 1894, the sum of $11,848.81, and the sum of $2,263.43 is now withheld by the City of Portland and is unpaid, although earned and due.

"5. That the said Lee Hoffman and complainant earned other moneys in the conduct of a camp and supply store for the laborers employed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant, and no part thereof has been paid to complainant.

"6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between said Lee Hoffman and the City of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water to the City of Portland and moneys earned therefrom, and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material, or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

"7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

"8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the

complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the City of Portland.		
On contract	$509,825.22	
For extra work.....	14,496.74	
		$524,321.96
Profits of camp, store, sale of livestock, interest, etc., etc.		15,339.76
Grand total		$539,661.72
Total gross cost of work, including salary of $20,000 to Lee Hoffman.....		$434,622.13
Balance		$105,039.59
Amount retained by City of Portland,		
On account of contract.....$	50,982.52	
On account of extra work...	2,263.43	
		$ 53,245.95
Less amount paid to Wolff, Zwicker & Buehner.....		18,627.17
Now held by City of Portland		$ 34,618.78
Amount drawn out by Lee Hoffman and defendant..		72,737.70
		$107,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
Balance as above.....		$105,039.59
One-half thereof owing complainant		$ 52,519.80

"9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, $5,234.60; furniture and fixtures, cost price, $187.85; camp fixtures, cost price, $1,246.16; miscellaneous accounts, $188.75; disallowed claim against the City of Portland, $16,961.25.

"Thereupon, in consideration of the premises, it was ordered, adjudged, and decreed as follows, to-wit:

"That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the City of Portland, and in all the matters and things hereinbefore set forth, and the complainant as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the moneys paid or to be paid by the City of Portland on account of its contract with said Lee Hoffman, and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other work done for the purpose of bringing water to the City of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom, as above set forth; that the complainant is a half-owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment, and all other such property above mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half-owner with the defendant in whatever interest she has in the disputed claim of $16,961.25 against the City of Portland above mentioned; that the defendant forthwith pay to the San

Francisco Bridge Company, out of the moneys in her possession drawn from the proceeds of said work, the sum of $2,316.89; that the costs of suit of both parties, taxed at $557.24, be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of $52,241.18.

"It is further ordered that the provisional order of injunction heretofore issued against the said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the City of Portland the moneys now held by it, as above-mentioned, be discharged in accordance with the stipulation of the parties filed herein."

Accompanying this decree was a written opinion found on page 96 of the record.

McMullen filed a cost bill in the trial court, found on page 104 of the record.

Both parties took an appeal.

RESPONDENT'S ASSIGNMENT OF ERRORS.

"First. In making findings numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, and 9, and in making and entering the following decree in said cause on the twenty-third day of June, 1896, to-wit:

[The assignment proceeds with a statement of the findings and decree in extenso, just as printed above.]

"Second. It is respectfully submitted that error was committed in said court in said decree in ordering and decreeing that said complainant and Lee Hoffman were partners from the said sixth day of March, 1893, and continued to be such partners up to and until the said twenty-third day of June, 1896, and in decreeing that said partnership be then dissolved, and in decreeing that said complainant was and is entitled to one-half the profits of said contract, dated the tenth day of March, 1893, made by the water committee of the City of Portland with Hoffman & Bates for the manufacturing and laying steel pipe for conveying the water from Bull Run river from head works to Mt. Tabor, and of extra work done under and in connection with said contract and extra work not connected with said contract, and from camp stores and other sources connected with said work of manufacturing and laying said steel pipe. Because it appears in the answer filed in said cause and from the testimony in the record that said complainant committed a breach of his said agreement contained in said contract of March, 1893, between complainant and Lee Hoffman, and failed, neglected, and refused to pay his share of money necessary to carry on said contract of manufacturing and laying said steel pipe, and that in consequence thereof the said Lee Hoffman on the twentieth day of September, 1893, dissolved said partnership, and the same then ceased to exist, and the complainant thereafter took no part in conducting said business, and did not act in connection therewith, and was not thereafter recognized by said Hoffman as a partner therein. That from and after said date the entire control, management, execution and responsibility of said contract was upon the said Lee Hoffman and not upon the complainant, and that any profits

which may have been earned after the said twentieth day of September, 1893, belonged wholly to the said Hoffman, and did not belong to the said alleged partnership composed of the complainant and said Lee Hoffman. That if said complainant was entitled to any profits whatever as a result of said partnership they were such only as may have been earned between the said sixth day of March, 1893, and the twentieth day of September, 1893, and was not entitled to any profits earned after the last-named date.

"Third. It is respectfully submitted that error was committed by said Court in said decree in decreeing that said complainant recover judgment against the defendant for the sum of $52,241.18; because it appears from the testimony in the record that of the $105,039.59 profits of said alleged partnership no more than $60,421.32 were ever paid or received by the said Lee Hoffman and the defendant. That at the time said decree was rendered, to-wit, on the twenty-third day of June, 1896, there were retained in the hands of the water committee of the City of Portland of earnings under said contract the sum of $34,618.17, which has never been received by or paid to said Lee Hoffman or this defendant, as his executrix, and the complainant is not entitled to any judgment for any portion of said sum against the defendant.

"Fourth. It is respectfully submitted that error was committed by said Court in said decree in ordering and decreeing that the defendant forthwith pay to the San Francisco Bridge Company out of moneys in her possession drawn from the proceeds of said work the sum of $2,316.89, because the testimony in this cause shows that the complainant claims the said sum of

$2,316.89, as advanced by himself as his contribution to the execution of said contract between himself and Lee Hoffman under the said contract of March 6, 1893, and was not, and is not, due to said San Francisco Bridge Company, but to the complainant, and that no money whatever is due to the San Francisco Bridge Company.

"Wherefore, said defendant, Julia E. Hoffman, executrix, prays that the said decree and order be reversed, and that said Court may be directed to enter a decree in accordance with the prayer of defendant's answer to the petition herein, or such decree as shall be found to be according to equity under the evidence in this cause." (Record, p. 117.)

PETITIONER'S ASSIGNMENT OF ERRORS.

"First. Your petitioner respectfully submits that the court erred in making its finding of fact No. 7, the same being as follows. to-wit:

'7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.'

"And your petitioner alleges that the evidence in said cause does not support the finding and determination of the Court that the sum of $1,000 per month for the period of twenty months, as stated in said finding, was proper compensation for the services of said Lee Hoffman for superintending said work, and alleges that the sum of $400 per month, and no greater amount, during said time is proper compensation for his said services, the same to be charged against the joint account in the settlement between the parties to the suit.

"Second. That the Court erred in making the eighth finding of fact set forth in said decree, to-wit:

'8. That a full and true statement of the account between the parties hereto touching the work, material, and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the City of Portland,		
On contract	$509,825.22	
For extra work	14,496.74	
		$524,321.96
Profits of camp, store, sale of livestock, interest, etc....		15,339.76
Grand total		$539,661.72
Total gross cost of work, including salary of $20,000 to Lee Hoffman.....		434,622.13
Balance		$105,039.59

Amount retained by the City of Portland, on account of contract	$ 50,982.52	
On account of extra work...	2,263.43	
		$ 53,245.95
Less amount paid to Wolff, Zwicker & Buehner.....		18,627.17
Now held by City of Portland		$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant..		72,737.70
		$107,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
Balance as above.....		$105,039.59
One-half thereof owing complainant		$ 52,519.80

That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant, is as follows, to-wit:

Total allowed and received from City of Portland...	$509,825.22	
For extra work	14,496.74	
		$524,321.96
Profits of camp, store, sale of livestock, interest, etc...		15,339.76
		$539,661.72

Brought Forward,		*$539,661.72*
Total gross cost of work, including salary of $8,000 to Lee Hoffman		422,622.13
Balance		$117,039.59
Amount retained by City of Portland on account of contract	$ 50,982.52	
On account of extra work...	2,263.43	
		$ 53,245.95
Less amount paid Wolff, Zwicker & Buehner.....		18,627.17
Now held by the City of Portland		$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant..		84,737.70
		$119,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
Balance as above.....		$117,039.59
One-half thereof owing complainant		58,519.80
Interest owing complainant at the rate of 8 per cent. per annum to June 23, 1896, date of decree, as below. Interest on half of $4,800, excess drawn for salary on December 30, 1893, from said date		476.80

Brought Forward,	*$58,996.60*
Interest on half of $7,200, excess drawn for salary on September 30, 1894, from said date	498.40
Interest on half of $8,855.04 drawn January 31, 1895..	494.91
Interest on half of $40,000, drawn June 17, 1895.....	1,626.66
Interest on half of $10,000, drawn July 15, 1895.....	375.51
Interest on half of $13,882.66 drawn August 5, 1895...	490.45
Interest on $2,316.89, advanced by complainant to December 30, 1893.....	83.80
	$ 62,566.33
Less interest on $17,609.91 advanced by Lee Hoffman from the several dates of advances to November 1, 1893	419.14
	$ 62,147.19

"Third. That the Court erred in decreeing that the costs of suit should be paid out of the common fund, and in not awarding to complainant judgment against defendant for his costs of suit.

"Fourth. That the Court erred in the decree rendered wherein it was found and adjudged that the complainant recover judgment against the defendant for the sum of $52,241.18, and that the Court should have

found and adjudged that the complainant recover from the defendant the sum of $62,147.19 and costs of suit.

"Wherefore, the above-named complainant prays that the judgment and decree rendered by the above-entitled Circuit Court of the United States for the District of Oregon may be reversed or modified by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the complainant may have a decree in this cause awarding him a judgment against the defendant for the said sum of $62,147.19, or such sum as the said United States Circuit Court of Appeals shall deem him to be equitably entitled to recover from the defendant, together with his costs of suit, and that the said Circuit Court of the United States for the District of Oregon shall be directed to enter a decree in favor of the complainant in conformity with the decree and mandate of the said United States Circuit Court of Appeals." (Record, p. 125.)

On these cross-appeals the cause came on to be heard before Judges Gilbert, Ross and Hawley in the United States Circuit Court of Appeals for the Ninth Circuit, and on October 4, 1897, an opinion was rendered (record, p. 575), and a decree entered (record, p. 615), reversing the decree of the trial court with costs. McMullen filed a petition for a rehearing, which was denied on February 28, 1898, without an opinion (record, p. 617), and thereupon he sought and obtained a writ of certiorari from this Court.

Brief and Argument on Respondent's Appeal.

For the sake of convenience and clearness we will present in the form of distinct briefs our views upon the appeals taken by each party from the decree of the circuit court for the district of Oregon.

The respondent offers two principal points as objections to a recovery by McMullen.

1. That the partnership engagement existing between McMullen and Hoffman was tainted with fraud *ab initio* in the matters charged in the answer, and consequently the court will decline to entertain the suit, or to give McMullen any relief whatever.

2. That conceding the relationship of partners to have been established between McMullen and Hoffman by the contract of March 6, 1893, Hoffman dissolved the partnership for cause on September 20, 1893, and because of such dissolution McMullen is not entitled to the relief prayed in his bill.

McMullen responds to the first ground of defense in effect by demurrer and by the joinder of issue. Conceding, for the sake of argument, that the charges of fraud are well grounded and are sustained by the evidence, he insists that the de-

fense is unavailing to the respondent; but, in point of fact, he absolutely denies these charges and the sufficiency of the evidence to establish them. In answer to the second point, McMullen denies that Hoffman terminated the partnership on September 20, 1893, or that he had any power to terminate it.

Statement of the Attitude which McMullen and Hoffman Occupied Towards the Matters in Suit.

Without at this time entering upon disputed or debatable ground, we think it will be helpful to the court to state the attitude which McMullen and Hoffman sustained towards each other with reference to the matters in suit. We think no issue will be taken with us by counsel for respondent as to the accuracy of the statement which we shall subjoin, but the statement will be taken with the qualification before noted, that our contention is that whatever transpired between the parties prior to their partnership agreement of March 6th cannot influence McMullen's right to recover in this suit.

We therefore assert:

1. That it was the agreement between McMullen and Hoffman that they would co-operate in seeking to get a contract from the City of Portland, and that they never intended to oppose each other.

2. That the successful bid submitted by Hoffman for the work, which is the principal feature of the pending controversy, was submitted in the joint interest of himself and McMullen.

3. That there was nothing inherently fraudulent or wrong in connection with this bid, separately considered.

4. That the partnership contract of March 6, 1893, between Hoffman and McMullen, was in itself lawful, and contemplated the execution of work which was free from any imputation of illegality.

5. That the contract of March 10, 1893, between Hoffman and the City of Portland was for the performance of lawful work.

6. That the only imputation of fraud or illegality in connection with Hoffman's bid, is the contention made by respondent that it was coupled with a fictitious bid submitted by McMullen, which last bid had a tendency to mislead the water committee as to the advisability of accepting Hoffman's bid.

7. That as Hoffman and McMullen had never intended competing with each other upon the letting under consideration, their action in nowise savored of stifling competition or depriving the city of the advantage of an additional bidder.

Upon the first proposition stated Judge Bellinger made the following finding in his opinion (record, p. 99):

"In this case the uncontradicted fact is that McMullen did not intend to bid for the work in question otherwise than jointly with Hoffman; that he came from San Francisco to bid with Hoffman, not to compete with him, and that this was in pursuance of an understanding had between the parties long before. The agreement was merely to secure co-operation between the parties, and so far from tending to lessen competition, it tended to increase the number of bidders since it does not appear that either of the parties intended to bid or would have bid on his own account."

This statement is abundantly established by the evidence.

In a letter written by McMullen to Hoffman December 31, 1892, (defendant's exhibit A, record, p. 578) he says:

"As you are acquainted with all the Water Commissioners, and have social and business relations with many of them, I think you are in a position to counteract this movement, and if we are to make anything ultimately out of this job it will be necessary to knock out this scheme. Get in and do what you can to beat it."

In McMullen's letter to Hoffman of January 26, 1893, (defendant's exhibit B, record, p. 579) he says:

"I think you ought to make Wolff & Zwicker understand that YOU AND I ARE TOGETHER, and that we are going to hit the job hard."

In McMullen's letter to Hoffman of February 6, 1893, (defendant's exhibit C, record, p. 521) he says:

"Please send us strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints, and any other plans for the pipe line that they may have.

"I have sent three copies of the specifications to Mr. Catt, and instructed him to get cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap welded pipe for the submerged portion; also cost of ball joints.

"I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things.

"I also have the old estimate, very full and complete, that we made five or six years ago—when the work was offered before."

In McMullen's letter to Hoffman of February 8, 1893, (defendant's exhibit D, record, p. 522) he says:

"I have made very full inquiries in the east, and Mr. Catt is going to devote his entire

time next week to getting prices on cast and wrought iron pipe and the cost of plant and equipment for doing the work, and other matters relative to the job.

"I want you to make very full and thorough investigation, too, AND THEN WE WILL COMPARE NOTES."

In Hoffman's letter to McMullen of January 23, 1893, (defendant's exhibit Z, record, p. 562), he says:

"Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I DO NOT CARE TO HAVE THIS CONTRACT ALL ALONE."

In Hoffman's letter to McMullen of January 30, 1893, (defendant's exhibit A 2, record, p. 563), he says:

"As you say we must do some rustling in the east if we want this work—now, my idea is, to get this iron punched and planed in the east, so that all we would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the east than here. I will enclose you a list of what it will take and the strength required; this will have to be iron (not steel), and I think if you could give this to Mr. Catt,

and if he has not got the time to look after it, he could give it to some iron broker, AND LET HIM GET US GOOD PRICES AND WE OUGHT TO GET THIS WORK, OR AT LEAST PART OF IT. I will go out over the line as soon as the weather settles a little. * * * "Anyway the time is short, and WE WILL HAVE TO RUSTLE HARD TO GET IN SHAPE TO MAKE A GOOD BID."

Hoffman writes to McMullen on February 3, 1893, (defendant's exhibit B 2, record, p. 565):

"I left an order with Col. Smith today to mail you 5 copies of specifications, as per your telegram. He expects to get them from the printers so that he can mail them to you this P. M. or tomorrow sure. You will see that the work is all split up, so I don't think it is as good for us if it had been all let in one bid.

"I will do what I can to get prices on the iron, AND WHEN YOU COME UP WE WILL MAKE UP OUR MIND WHAT TO BID ON. We ought to get part of this work any way.

"Let me hear from you when you expect to be here."

Hoffman writes to McMullen on February 8, 1893, (defendant's exhibit C 2, record, p. 565):

"I herewith send you strain diagrams on file for the bridges, profiles of the crossings, and details of the [*sic*] and profile of the bridges. The general

plans I cannot get now, but expect to have them tomorrow, and will then mail them to you. The engineer has changed his mind on the steel question and has concluded to ask for bids on steel also, but iron will be preferable all things being equal; and instead of having one pipe, 33 in. diameter for the submerged pipe, 2 26 in. pipes will be preferred. I will advise Mr. Catt about this."

Hoffman writes to McMullen on February 11, 1893, (defendant's exhibit D 2, record, p. 566):

"Have mailed you under separate cover today general plans for the three bridges. * * * Get the very best prices you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe. * * * * WE ARE TO WORK ON THE MATTER AND WILL HAVE OUR FIGURES IN SHAPE BY THE TIME YOU GET HERE."

Hoffman writes to McMullen again on March 10, 1893, in regard to their operations which antedated the submission of their bid (defendant's exhibit E 2, record, p. 567):

"I think that we have the best part of the contract, and if we did not make a big mistake in our cost of laying, we will make a lot of money."

So on March 14, 1893, McMullen wrote Hoffman (defendant's exhibit G, record, p. 527):

"Now, Lee, that we have gotten rid of furnishing the plant, and rid of the organization and administration of a pipe shop, and got it reduced to a plain proposition of digging the ditch and laying and riveting the pipe, it will not require much money now to handle the job, perhaps you would like tobuy me out, as the conditions that originally led us to go in together, namely, the large investment and administration involved, are now overcome, and you could handle this thing just as well without me as with me. You readily understand that it is a much simpler proposition now than it was when we first agreed to go together. Of course, I only make this as a suggestion. If you do not think favorably of it, and prefer to let it remain just as it is, we are agreeable, and will try and contribute our share to make the venture a success—which I feel sure it will be."

On March 16, 1893, Hoffman answers this letter (complainant's exhibit 21½, record, p. 496), and says: "I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, BUT AS IT IS A NEW LINE OF WORK I WANT YOUR ASSISTANCE."

In addition to this exchange of letters there is the oral testimony of the witnesses.

On his cross-examination by respondent's counsel, McMullen gives the following testimony:

"Q. Whatever consultations you had with Mr. Hoffman relative to procuring the contract from

the water committee was with a view of making you and he performing the work together in case you got the contract, was it not?

"A. Yes, sir.

* * * * * * *

"Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did not you? (Record, p. 171.)

"A. We did.

"Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

"A. I think so; that is correct.

"Q. Do you not know so?

"A. Yes, I think I know so; if you will read the question again I will make it a little more explicit.

(Last two questions read to the witness by the examiner.)

"Yes, I know it is so. (Record, p. 172.)

* * * *

"Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

"A. Certainly I had expectations decidedly. All the correspondence for three months prior to

that will show that it was mutually agreed that we should be partners.

* * * * *

"Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe, you expected to be partners in executing the work if you got it, if it was awarded on that bid?

"A. Yes, that is correct, not only expected to be, but we had agreed to be." (Record, p. 173.)

On re-direct examination McMullen testified (record, p. 221):

"Q. Mr. McMullen, when did the matter of joint action between yourself and Mr. Hoffman in regard to the water works of the city of Portland under consideration first come up?

"A. It first came up several years before this job was awarded when the bids for building the Bull Run pipe line were taken, I think, in 1887, after we were the lowest bidder. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said that he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds; he said, 'When this thing comes up again, Mac, WE MUST GO IN

TOGETHER, AND SEE IF WE CAN'T GET IT,' and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Henry S. Wood, a witness for McMullen, whose deposition was taken in San Francisco, testified (record, pp. 148-9):

"Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid, which was to be submitted by the San Francisco Bridge Company or McMullen in connection with Lee Hoffman; that is to say, the manner in which they were to bid upon the work?

"Answer. It was understood, as result of a visit of Lee Hoffman to San Francisco, before the letting, and as a result of conferences between him and John McMullen, at some of which conferences I was present, that said HOFFMAN AND MCMULLEN WERE TO BID TOGETHER UPON THE WORK FOR MUTUAL ASSISTANCE, ADVICE AND PROFIT, and at no time was it considered probable that the San Francisco Bridge Company could or would bid alone upon said work with the intention of taking said work."

George W. Catt, a witness for McMullen, whose deposition was taken in New York, testified (record, pp. 151-3):

"Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company, or John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

"To the third interrogatory he saith: Soon after I had undertaken the management of the business of the San Francisco Bridge Company for the states of Oregon, Washington, Idaho and Montana, Lee Hoffman, of Portland, Oregon, then proprietor and manager of the business conducted under the firm name of Hoffman and Bates, approached me in reference to the San Francisco Bridge Company and that firm joining forces for the building of the contemplated 'Bull Run' water works for the City of Portland, Oregon. Lee Hoffman and I had several conferences concerning such a union of the two concerns for this work. In 1891, Mr. Lee Hoffman and I journeyed together from Spokane, Washington, to Tacoma, Washington, via the N. P. R. R. During this journey Lee Hoffman and I arrived at a basis of agreement by which the S. F. B. Co. should unite with Hoffman & Bates in the construction of the 'Bull Run' water works, in case either of us secured from the city of Portland, Oregon, the contract for building said works. The essential point of that agreement was, that

the work should be executed by us jointly for the joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the 'Bull Run' water works. It was a general understanding between us, the details of the agreement being left to be settled when a contract was obtained. This arrangement was often referred to by Lee Hoffman, between time of making of it and time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic Coast. It was also agreed between Lee Hoffman and myself that I should make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make some investigation during the year 1891, by correspondence with manufacturers of tools, etc., also visited the Albion Iron Works of Victoria, B. C., which was at that time manufacturing some pipe of this character. I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangement with Lee Hoffman, and when the work was advertised for the city of Portland, Oregon, in 1893. In making my estimate for the work mentioned I addressed some of them to J. McMullen and Hoffman & Bates

jointly. The agreement was that J. McMullen should collect what information he could at San Francisco, California, with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Oregon, where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the east would be forwarded to Lee Hoffman and J. McMullen, of Portland, Or., and that after they had made a comparison of all information collected, they should agree upon the amount to be bid for the work jointly."

H. D. Bush, a witness for respondent, testified as follows:

"Q. Mr. Bush, you may state your name, age, residence, and occupation.

"A. My name is Harry Dean Bush, 38 years old; my present residence is Springfield, Massachusetts; I am a civil engineer.

"Q. Were you ever at any time in the employ of Lee Hoffman?

"A. Yes, sir.

"Q. When did you first enter his employment, and how long did you remain in it?

"A. I entered his employ in September, 1892, and remained until December, 1895. (Record, p. 262.)

"Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland?

"A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return. (Record, p. 263.)

* * * * *

"Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

"A. Well, Mr. McMullen came up with him, AND MR. HOFFMAN INFORMED ME THAT HE AND MR. MCMULLEN WERE GOING TO BID TOGETHER FOR THE WORK; Mr. McMullen had a great many estimates and figures and letters referring to the cost of the work, and I went all through those. (Record, p. 264.)

* * * * *

"Q. And what was the final total of the bid that you made out, or which was made out for you by Mr. Hoffman?

"A. The final total of that bid that we expected to put in, until within the last hour, was $479,167.00.

"Q. $479,167.00?

"A. Yes, sir.

"Q. What was the bid that you actually put in

"A. $465,667.00.

"Q. How did that come to be reduced?

"A. Why, Mr. McMullen came into the office within the last hour, very much excited, and said that he had made up his mind that we were too high, and had got to take off something; we took off five cents a yard on the item of earth excavation; this amount is 270,000 yards at five cents a yard, amounting to $13,500.00." (Record, p. 266.)

* * * * *

On cross-examination this witness testified:

"Q. I understand that the aggregate estimate at which you arrived upon which a bid might be predicated for all the work in connection with the manufacturing and laying of the steel conduit from the head works of this system to Mt. Tabor was $420,257.00?

"A. Yes, sir.

"Q. Now, that was raised afterwards to $479,167.00?

"A. Yes, sir.

"Q. Who made that raise?

"A. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it.

"Q. Hoffman and McMullen together?

"A. Yes, sir. (Record, p. 282.)

* * * * *

"Q. And when Hoffman came back from San Francisco just before the letting of this work, McMullen came with him, you say?

"A. I think so, yes, sir.

"Q. After Hoffman said that McMullen was going to bid with him on the work?

"A. YES, SIR; THEY WERE GOING TO BID TOGETHER." (Record, p. 283.)

On re-direct examination Bush testified:

"Q. After Mr. McMullen came here from San Francisco, and between the time of his arrival here and the time the bid which was agreed upon between him and Mr. Hoffman was submitted to the water committee, were you in receipt of any information requiring a change of any sort in the estimates upon which that bid was based?

"A. No, sir; they were not in receipt of anything that required any change. Mr. McMullen

brought his telegrams in to me, but I did not see anything that made any particular change necessary. (Record, p. 300.)"

Robert Wakefield, a witness for McMullen, testified (record, p. 423):

"Q. Did you ever have any talk with Mr. Hoffman during his lifetime in regard to the procurement of the contract which was secured by him with the city of Portland for the manufacturing and laying of steel pipe in connection with McMullen's association with him?

"A. Yes, sir.

"Q. I will ask you to state whether or not in the course of any of your conversations Mr. Hoffman said anything to you about how the contract had been secured.

"A. Yes, sir.

"Q. You may state what he did say.

"A. He said that he would not have been in it only for McMullen, that is the words he used, 'He would not have been in it only for McMullen.'

"Q. Was anything said in regard to figures which had been made on the contract—estimates by one or the other of them?

"A. Yes, sir.

"Q. What did he say about that?

"A. He said that McMullen made him come down between $40,000 and $50,000."

We feel justified in making this prolix review of the evidence from the fact that the circuit court of appeals decided the cause upon the theory in large measure contended for by respondent's counsel that the action of Hoffman and McMullen tended to stifle competition; that except for their agreement McMullen would have put in a lower bid than the one cast by him; and that by this combination between them the city of Portland lost the advantage of having McMullen as an actual competitor for the work. It is largely upon this misconception of the case before them that the circuit court of appeals were led to render their decision.

We do not claim to hold the counsel for respondent precluded from their argument that Hoffman and McMullen knew the bids which were cast by each of them for this work, and that Hoffman knew that McMullen proposed to submit what would appear to be an additional bid to that submitted by Hoffman in their joint interest; *but we do assert that there is not the slightest warrant for holding or claiming that Hoffman and McMullen ever intended to compete with each other upon this letting, or that an actual bidder was lost to the city of Portland by the course which they pursued.*

The primary question before the Court is, therefore, this:

Where Hoffman in the joint interest of himself and McMullen submitted a bid to the city of Portland, while McMullen, with Hoffman's concurrence, submitted a fictitious bid in larger amount for the same work, and a contract was awarded to Hoffman on his bid; and where Hoffman and McMullen, as partners, performed the work covered by this contract and made a profit which is in Hoffman's hands, can he refuse to divide with McMullen on the ground that he and McMullen were guilty of a fraud in their bidding, this fraud consisting in McMullen having submitted his larger bid?

We state the case at this time in its broadest aspect for the purpose of drawing full fire from respondent's counsel. If the question is answered in the negative, that is an end of this branch of the discussion.

It is no more than fair to counsel for respondent to state here that their contention has heretofore been, and presumably still is, that it was an inherent part of the partnership contract between Hoffman and McMullen that they should endeavor to secure a contract from the city by the means which are assailed; while we insist that it was no part of *their partnership contract*, but, granting for the argument, respondent's contention in regard to the character of their acts in submitting bids, it was no more than the performance of an illegal act in the advancement of

a legal contract of co-partnership. But the distinction is really an immaterial one, as the result must be the same in either case.

With regard to the partnership agreement between Hoffman and McMullen it will be noted that the only promises made by either of them are:

1. That Hoffman and McMullen shall share equally in the contract awarded by the city of Portland to Hoffman & Bates, for manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for said city;

2. That each will furnish and pay one-half of the expenses of performing said contract;

3. That each shall receive one-half of the profits, or bear and pay one-half of the loss, arising from such performance; and

4. That if either of the parties gets a contract for doing, or do, any other part of the work let, or to be let, for bringing Bull Run water to Portland, the profits or losses arising from the performance of such contract shall be shared and borne by the parties equally.

Thus, neither Hoffman nor McMullen was required by said partnership agreement to do anything at all open to objection by the most scrupulous person, since the agreement called for nothing but the performance of just such duties as

are generally assumed, when parties enter into an agreement of that character.

Nor can there be any question as to the validity or legality of the consideration for that agreement, which was the mutual promises of Hoffman and McMullen to assume the relation of co-partners on the terms specified in the agreement and for the purposes mentioned therein, which were the fulfilment of the contract entered into with the city of Portland for the manufacture and laying of said pipe line, and the performance of any other contract with said city in connection with the construction of its water works that might be thereafter obtained by either Hoffman or McMullen.

We shall answer further along the contention of respondent's counsel that back of this formal instrument there was a fraudulent compact between Hoffman and McMullen which led up to and became merged in this writing. For the time being we content ourselves with saying that the work contemplated by this contract was performed, that respondent has in her possession its fruits, and that McMullen is seeking in this suit to recover his half interest therein as a partner.

Some preliminary consideration of the rights and obligations existing between partners and between principal and agent may prove of utility in approaching a discussion of the legal questions involved in the pending case.

The contract of March 6, 1893, together with the action of the parties under it established, the relationship of partners between Hoffman and McMullen; and out of this relationship, and not out of the partnership agreement, grew the rights which McMullen is seeking to enforce in this suit.

Partnership is a condition. Its results are determined by the application of legal principles. It may have its origin in an express contract, and the contract may be useful in furnishing a guide for the measurement of the rights and duties of the partners *inter se*. In case of a controversy, its settlement must be determined in the light of the contract stipulations. But the contract is only a matter of evidence in determining the adjustment of conflicting claims growing out of transactions had under it. As to such matters, it is not a cause of suit, nor is the cause of suit predicated upon it. After an agreement to form a partnership has been entered into, if either partner refuses to proceed,—to launch the partnership,—the other may have his action for damages for breach of contract, or, it may be, a suit for specific performance. In such a case the cause of action rests upon and grows out of the contract to be partners. But after the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership *relation;* and if a claim to property is involved, it is the property right of the partner, growing out of

partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

In 1 Lindley on Partnership, 2d Am. ed., p. 2, it is said:

"Partnership, although often called a contract, is in truth the *result* of a contract; the *relation* which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits."

In Mechem's Elements of Partnership, p. 3, speaking of the definition of "partnership" sometimes given in works on that subject, it is said:

"In several of the definitions, partnership is spoken of as a contract. It is, however, rather the *result* of a contract than the contract itself; it is the *relation* or association which the contract creates."

And in Bates on Partnership, vol. 1, sec. 78, it is said:

"An executory contract to form a partnership is not a partnership, though it may ripen into one, by being what is called launched, that is, by carrying the agreement into effect and engaging in the joint undertaking; but the effect and the agreement itself are two different things."

So also, in Pollock's Digest of the Law of Partnership, sec. 1, it is said:

"Partnership is the *relation* which subsists between persons who have agreed to share the profits of a business carried on by all or any of them, on behalf of all of them."

In Parsons on Partnership, 4th ed., sec. 6, note *d*, speaking of an executory contract to form a partnership, it is said:

"The contract is executed when the partnership relation is entered into. All that is done after that, is done by and for the partnership. If land is purchased, it is the land of the partnership, and not of the individual partners. *In short, the only action that could be brought for breach of the contract would be an action for failure to lauuch the partnership. Any cause of action arising after the partnership was formed would arise out of the partnership relation.*" (Italics ours.)

Another principle applicable to the point under consideration is that the relation of partnership is one of agency. What one partner does, is done as agent for the other; what one receives, is received as agent for the other and in trust for the other to the extent of his interest; and the agent or trustee cannot shield himself from accountability by claiming that the thing which had come to him was tainted.

In Story on Partnership, sec. 1, it is said:

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules as those of an agent. A partner, indeed, virtually embraces the character both of principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership."

Speaking of this statement of the law relating to partners, Lord Wensleydale, in *Cox vs. Hickman*, 8 H. of Lords Cas., 268, 311, said:

"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership."

That the same rule applies between partners as between principal and agent is clearly shown by the decision in *Planters' Bank vs. Union Bank*, 16 Wall., 484, which was a clear case of agency,

and in which *Brooks vs. Martin*, 2 Wall., 70, a case of partnership, was followed as having settled the law applicable to the case.

The controlling importance of these principles upon the cause in suit, if not obvious, will be shown a little further along.

No partnership touching the work in controversy resulted from anything which transpired between Hoffman and McMullen prior to the award made upon Hoffman's bid, nor until they had signed the partnership agreement of March 6, and entered upon the performance of the work contemplated therein.

It has been the contention of counsel for respondent that the entire arrangement between Hoffman and McMullen to secure a contract from the City of Portland and to execute it, if secured, by their joint action, was, for all the purposes of this suit, void from its commencement to its conclusion by reason of what they claim to be the fraudulent practices indulged in by Hoffman and McMullen in the submission of their bids. On the other hand, we assert that there were two distinct partnership engagements—one to co-operate in the effort to secure a contract from the city, coupled with the mutual promise to become partners in the execution of the work, if secured, and the other the agreement of March 6. The one came into existence with their first contemplation of joint action in their bidding and terminated

with the award which was made on Hoffman's bid; the other began with the contract of March 6, and will not be terminated until the final decree of this court is rendered settling and adjusting the respective rights and interests of the partners in the accomplished venture. Or, at least, the break indicated establishes two distinct stages in the joint negotiations and operations of Hoffman and McMullen, and it cannot be said that they were partners in the subject of this suit by virtue of anything which occurred between them prior to the award made by the City of Portland on Hoffman's bid. It seems to us that our first characterization of the situation is the accurate one. The first agreement between the parties was absolute, the second depended on a contingency; upon the first they went immediately to work, the second might have wholly failed.

McMullen testifies on this point on cross-examination:

"Q. When did it first occur to you to make contract, exhibit No. 1?

"A. After the water committee had awarded the contract to Hoffman & Bates on their bid; I think that award took place on the 4th or 5th of March; exhibit No. 1 was made on the following day, or the 6th of March.

"Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had

no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

"A. Certainly I had expectations decidedly. All the correspondence for three months prior to that will show that it was mutually agreed that we should be partners.

"Q. What, then, did you mean by your last answer, in which you said you did not expect contract, exhibit No. 1, would be executed at the time you put in the bid for the work?

"A. Well, your question seems to assume that exhibit No. 1 was in existence before the bid for the work was put in.

"Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe you expected to be partners in executing the work if you got it, if it was awarded on that bid?

"A. Yes, that is correct, not only expected to be, but we had agreed to be.

"Q. Then the contract, exhibit No. 1, was simply reducing into the form of a writing the agreement that had already been made between you long previous?

"A. That is not quite correct; the agreement was that we should bid together—that we should

make a bid on this job together; now, there was an 'if' there, in other words, the conditions that prevailed after the contract was awarded was different from the conditions that prevailed when we were simply in the air trying to see what the job would cost, and conferring with each other; but we had a tangible, absolute thing when the award was made from the water committee of the City of Portland for a half million dollars' contract, and that award was of record, and exhibit No. 1 was a declaration that we were partners in the existing contract between Mr. Hoffman and the Portland water committee. (Record, p. 173.)

* * * * * * *

"Q. The general purport of that contract had not that been entered into between you long before that?

"A. You understand as a lawyer that we could not make the contract—

"Q. Just answer the question I have asked you.

"A. No, you could not say that because this contract, exhibit No. 1, says that so and so existed, and so and so did not exist before that award; we had agreed to be partners, if that is all the agreement meant after reducing it to writing, if the same thing was synonymous in your mind; I think the two things are entirely different. (Record p, 174.)

* * * * * * *

"Q. Well, Mr. McMullen, I am coming to the point; now, then, as I understand you, your statement is about this: You and Mr. Hoffman had an understanding together that you would bid for the work that has been named in your deposition, that in pursuance of that agreement you did prepare a bid for that work, and submit it to the water committee, and the contract was awarded by that committee to Hoffman & Bates, in whose name the bid was put in; that you and Mr. Hoffman afterwards made the contract, exhibit No. 1, in this case, for the purpose of performing that work, is that it?

"A. That is correct." (Record, p. 175.)

The terms of the contract of March 6 subscribed to by both Hoffman and McMullen support this interpretation of the attitude they sustained towards each other.

In confirmation of the distinction between an agreement entered into by two persons to become partners and their actual situation as partners, we submit the following additional authorities:

In *Groves vs. Tallman*, 8 Nev., 178, 180, the court said:

"As between partners, the ultimate facts whence a partnership is deduced are—first, the agreement; second, its execution; summed up as the executed agreement."

In *Powell vs. Maguire*, 43 Cal., 11, the court said (p. 19):

"In such cases it is well settled that, when the partnership was never launched, and when one of the co-partners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launching the enterprise."

In *Reboul vs. Chalker*, 27 Conn., 114, 130, the court said:

"If we are right in this, that the partnership did not in fact commence until the first of May, it is quite clear that until that time it was in the power of either party to refuse to go on with it. It was like any other executory contract, which either party may refuse to carry out; and the remedy for such refusal would be an action for such damages as the party may have suffered in consequence of it."

So, also, in *Wilson vs. Campbell*, 5 Gilm., 383, 402, the supreme court of Illinois said:

"A mere agreement to form a partnership does not of itself create a partnership. The parties must enter on the execution of the agreement before the relation of partners exists between them. While the agreement remains executory, if one of them refuses to carry it into effect, the only remedy of the other is by an action at law for the violation of the agreement, or by a bill in equity to enforce specifically its performance."

Again, in *Lycoming Ins. Co. vs. Barringer*, 73 Ill., 230, 233, the same court said:

"A partnership was contemplated, but never consummated. An intention to form a partnership, or an agreement to form one, does not create a partnership. *Wilson vs. Campbell*, 5 Gilm., 383."

And in *Doyle vs. Bailey*, 75 Ill., 418, 421, the court said:

"There is a wide difference between a partnership entered into between two parties in regard to certain business, and an agreement to form a partnership. In the case of *Wilson vs. Campbell*, 5 Gilm., 383, it was held that a mere agreement to form a partnership does not of itself create a partnership. The parties must enter upon the execution of the agreement before the relation of partners exists between them."

So, also, in *Meagher vs. Reed*, 14 Colo., 335, 347, the court said:

"A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement."

The court then proceeded to state the distinction between an agreement *of* partnership and an agreement *to become* partners at a future time, and said:

"It is undoubtedly true that a partnership *in præsenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is

no remedy between the parties except a suit in equity for specific performance or an action at law for the recovery of damages, should any be sustained."

It is plain, therefore, that the agreement of Hoffman and McMullen to become partners, in case a contract should be awarded by the City of Portland on a joint bid put in by them, did not establish any partnership relation between them, and that when the event mentioned occurred, no partnership existed between Hoffman and McMullen, until said agreement *to become* partners had been fulfilled by their actually assuming that *relation* towards each other.

McMullen's cause of suit was not based upon the partnership contract, but upon the duty of Hoffman to account to him for half their earned profits, which duty grew out of and rested upon their relationship as partners.

To the minds of counsel for McMullen this point is so absolutely clear as to be beyond the pale of debate, and had the circuit court of appeals recognized it their conclusion must have been the reverse of that announced.

It is conceded both by counsel for respondent and by the circuit court of appeals, while denying McMullen's right to relief under the facts in evidence, that if Hoffman, after he had received the money from the City of Portland, had acknowledged McMullen's interest in the fund, or promised to pay it to him, then McMullen might

have successfully maintained an action based on such acknowledgment or promise. In their opinion the circuit court of appeals say (record, p. 614):

"If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks vs. Baber*, 53 Ill., 292; *Chace vs. Trafford*, 116 Mass., 532; 1 Am. & Eng. Enc. Law (2d Ed.), 437). But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought."

This concession carries with it an unqualified admission of McMullen's right to recover in this suit, for the simple reason that an implied promise is as effectual in law as an express one, and the very receipt of the money by Hoffman raised an implied obligation on his part to pay over to McMullen his half of it.

Where money is received by one to the use of another it does not require an express admission or promise from the depositary to enable the beneficiary to recover. Such admission or promise is simply a matter of evidence going to establish the right in court, and is not to be confounded with, or mistaken for, the right itself. And so it is in all questions of accounting be-

tween partners and between principal and agent. The contract of partnership or of agency is but *evidence of the relationship* from which there may be inferred the implied promise to account, but it is not the cause of suit, it is not a promise to pay, and no specific promise is necessary to sustain a recovery. All of these cases stand upon the same footing.

Under the modern rules of pleading from which the fictions of the common law have been discarded, allegations of express promises to perform duties laid upon the promisor by virtue of his relationship towards the promisee are dispensed with, the principles of law applicable to the relationship supplying the promise, and thus affording the cause of suit. Mr. Pomeroy in his work on Remedies and Remedial Rights says, Sec. 540:

"The practical rule may be considered as settled, that, in all instances where the right of action is based upon a duty or obligation of the adverse party which the common law denominates an implied contract, it is no longer *necessary* to aver a promise, but it is enough to set out the ultimate facts from which the promise would have been inferred. This being so, we must go a step farther. If it is not *necessary* to make such an allegation, then it is not *proper* to do so."

The keynote of the principle upon which McMullen must prevail in this suit was struck in

Tenant vs. Elliott, quoted with approval by this court in *McBlair vs. Gibbes*, 17 How., 232. It is said by Mr. Justice Nelson on page 236:

"In *Tenant vs. Elliott*, 1 Bos. & P., 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. *The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction.* The same principle was applied and enforced in the case of *Farmer vs. Russell*, 1 Bos. & P., 296." (Italics ours).

In *Tenant vs. Elliott*, Eyre, C. J., stated the proposition under consideration thus:

"The question is, whether he who has received money to another's use, on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

In *Farmer vs. Russell*, 1 Bos. & P., 296, the defendants, who were common carriers, agreed with the plaintiff to take certain goods called medals to Portsmouth, and to deliver them to a

person there on receiving payment for them. It appeared that the medals were, in fact, counterfeit halfpence, sent to Portsmouth for the purpose of being distributed there among the sailors. The defendants received the money for the medals, and accounted for all of it except £13, for the recovery of which the plaintiff brought the action. Chief Justice Eyre stated the question thus:

"The plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* arises."

Buller, J., said:

"The plaintiff's case was made out, when he showed that the defendants had received so much money for his use, and it was immaterial whether this money was paid on a legal or an illegal contract. The money having been paid 'by another' to the plaintiff's use, the illegal contract is out of the question."

Can it make the slightest difference that in one case the action may be at law for a known or admitted sum of money, while in a suit like the pending one an ascertainment of the amount due must be sought in the proceeding for its recovery? The basic principle governing the *right of recovery* is the same in each instance, and this

right is not to stand or fall by the *form of action* to which the plaintiff is compelled to resort for its enforcement.

Can it be possible that McMullen's right to recover his interest in this fund depends upon Hoffman's admission or promise to pay? The court of appeals decided this cause on the theory that because of the corruption between Hoffman and McMullen, and because of the interest of the public in putting the seal of condemnation upon their practices, McMullen could not recover. Now if that is a fatal objection to McMullen's suit in the absence of Hoffman's explicit admission or promise to pay, does the power lie with Hoffman, by a simple admission or promise, to strike down this public interest, or can he make the transaction "honest by a single stroke of the pen?"

It is clearly apparent that the learned circuit court of appeals fell into an error in their conception as to what constituted McMullen's cause of suit, and having done this it is easy to see how they reached an erroneous result.

McMullen does not need the support of the matters urged by the respondent in defense of his suit, and the court have no occasion to investigate these matters in arriving at a solution of the pending controversy.

What has just been said has application to this point and perhaps suggests sufficient for its answer, but so much stress was laid by the cir-

cuit court of appeals upon the idea that the exigencies of McMullen's case required them to investigate questions of alleged fraud, that we feel justified in presenting more fully our views upon the proposition. In the opinion rendered by Judge Hawley he says (record, p. 614):

"This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. * * * * * The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do."

With all deference to the learned judge, we protest:

1. That the foundation of the case does not rest upon the legality of the contract between Hoffman and the city of Portland.

2. That the relief prayed for did not require the court to investigate all the various transactions of the parties from the beginning to the end.

3. That if the court were called upon to examine obnoxious matters, the call emanated from Hoffman and not from McMullen, and it ought not to have been entertained.

The first proposition has been sufficiently proven.

With regard to the second, it is true that in the bill of complaint allusion is made to the bidding as introductory of the contract between Hoffman and McMullen, but the allegations were purely by way of inducement. The bill would have been every whit as good without these allegations as with them, and McMullen would have omitted them had he foreseen in any degree the course subsequently adopted by Hoffman. When it came to the taking of the testimony, McMullen opened his case by introducing the partnership agreement of March 6, 1893, and objected to all of respondent's evidence which has relation to matters antedating the agreement. (Record, p. 172).

McMullen made his case by showing:

1. That he and Hoffman were partners in the work done for the city of Portland, and, *as evi-*

dence of this fact, he introduced their agreement of March 6.

2. That as partners he and Hoffman had made a certain profit on the work, and, as evidence of this fact, he introduced Hoffman's books of account.

McMullen did not call upon the court to examine any of the matters which the circuit court of appeals find to have been pernicious, nor did his right to recover depend upon them in any degree. He had made his case without reference to them. All the matters constituting the basis of relief sought by him were to be found in the books of account kept by Hoffman, and ascertaining from the partnership agreement of March 6 that McMullen was entitled to half the earned profits, the rest was simply a proposition of mathematical calculation. Indeed, there was no real occasion for his offering the partnership agreement at all, for its terms and the fact that the parties had entered into it, as alleged in the bill, were admitted in the answer, so that the court need have looked to the books of account alone. And so far as the circuit court of appeals were concerned, the results shown by the books appear in the record by an agreed statement of facts. There was not and could not have been anything legitimately in the record repulsive to the court.

The decree of the circuit court commences with a finding that on the 6th day of March this

agreement was entered into, and then proceeds to dispose of the controversy with this date as the initial point. (Record, p. 92). We submit that McMullen was right in the course he pursued, and that the decree is well framed.

Judge Hawley says again in his opinion (record, p. 599):

"No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*."

We grant the truth of the general statement first made, and while we deny that our cause of action possesses any vice, we will briefly submit our conception of the maxim adverted to and show the misapplication made of it to the pending case.

In cases of *par delictum* we understand the rule to be that the moving party cannot secure

any affirmative relief against the other if he rests his demand upon a rotten foundation,—if he must make out his case through the medium and by the aid of something which the law will not tolerate,—and that if the plaintiff does not disclose the fact that his demand is thus infected, the defendant may show that the plaintiff is dependent upon, or "requires the aid of," *the illegal thing* as a condition of success. But this is a purely defensive weapon. Neither party can gain any advantage from his situation except by uncovering, when attacked by the other, the inherent weakness of his adversary's case. Neither can make a merit of their common state nor get any benefit from it except in this indirect way, and the salient vice of the decision of the court of appeals is that it was in nowise shown by either McMullen or the respondent that McMullen's case was dependent upon, or that he required the aid of, the matters which the respondent claims were fraudulent, for the enforcement of his demand; and yet the respondent was allowed to invoke the aid of the common fraud (so found), and thus, independently of the necessities of McMullen's case, to defeat his recovery.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner's right of recovery, and her action was entirely unnecessary for the proper disposition of the controversy.

A number of decisions of the New England courts based on the "Sunday laws" of those states afford useful analogies. Thus in *Welch vs. Wesson*, 6 Gray, 505, the parties had engaged in a driving contest for a wager, and in its progress defendant wilfully ran down plaintiff and broke his sleigh. To plaintiff's action for damages defendant was allowed to prove that the parties were violating the law when the injury occurred. On appeal the court said (p. 506):

"That he [plaintiff] had no occasion to show into what stipulation the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particu-

lar cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another."

In *Hall vs. Corcoran*, 107 Mass., 251, the defendant hired from the plaintiff, on a Sunday, a horse and sleigh to drive from South Adams to North Adams for pleasure. After reaching North Adams the defendant drove to Clarksburg, and on their return from that place the horse and sleigh were injured.

At the trial of the action in the superior court it appeared, upon cross-examination of the plaintiff and of a witness called on his behalf, that the hiring was on a Sunday, and the judge ruled that the action could not be maintained.

The supreme court said (p. 257):

"Proof of the contract under which the horse was delivered by the plaintiff to the defendants showed indeed that the driving of the horse beyond North Adams was not within its terms or object; but the only legitimate inference from that fact is, that it is wholly immaterial whether such a contract was ever made, or, if once made, whether it had been terminated by mutual assent of the parties or by the wrongful act of the defendants. In short, the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question whether the contract between the parties was valid or void in

law, or whether there was or was not any such contract in fact. That contract need not therefore be shown by the plaintiff; and if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants."

So in *Woodman vs. Hubbard*, 5 Fost., 67, the plaintiff's horse was hired by the defendant on a Sunday to go from Great Falls to South Berwick. Defendant drove the horse to South Berwick, and from thence to another place some miles beyond. Soon after the horse was returned by the defendant to the plaintiff it sickened and died, and the evidence on the part of the plaintiff tended to show that the death of the horse was occasioned by the unreasonable and immoderate driving of the defendant.

It was contended on the part of the defendant, that, as the horse was let under a contract made on a Sunday and for use on that day, the plaintiff could not recover any damages from the defendant for the conversion of the horse.

A verdict was rendered for the plaintiff, and on a motion of the defendant to set it aside and to grant a new trial, the supreme court of New Hampshire said (p. 74):

"In this case, the defense set up is that the plaintiff's contract was not merely invalid, as in

the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act. It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule when the plaintiff's illegal act is in whole or in part *the foundation of his claim.* In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. *Simpson vs. Bloss*, 7 Taunton, 246, (2 C. L., 89;) *Fivaz vs. Nichols*, 2 M. G. & S., 500, (52 C. L., 500.) But, where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his *right of property* untouched, and does not in its consequences reach to the case on which he relies." (Italics ours.)

McMullen's suit against Hoffman was founded on *property rights* entirely, viz., upon McMullen's equitable ownership of a half interest in the contract made by the city of Portland with Hoffman and on McMullen's ownership of one-half the profits realized from the partnership business carried on by Hoffman and him; while the illegality and fraud set up by Hoffman was in

a transaction which did not affect in any manner the property rights mentioned.

It is plain, therefore, that Hoffman's defense of illegality and fraud, did not reach to the case relied on by McMullen for a recovery in his suit against him.

The test as to whether the connection between a matter in suit and an illegal transaction will defeat or affect a recovery in the suit is simple and clearly understood. It has been declared in terms by this court.

In *Armstrong vs. American Exchange Bank*, 133 U. S., 433, the court say (p. 469):

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."

And in *Swan vs. Scott*, 11 S. & R., 155, 164, the rule is stated thus:

"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case."

In *Wright vs. Pipe Line Co.*, 101 Penn. St., 204, Paxon, J., quotes this passage with approval,

and adds (p. 207): "The converse of this proposition is equally true: that where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant who has enjoyed its benefits cannot set up the defense of ultra vires."

Here McMullen made complete proof without reference to the alleged illegal transactions. He sought no aid from them and required none. So far as his partnership agreement is concerned, it was supported by his promise to perform services for the firm. So far as his right to share the profits earned by the firm went, his demand was supported by the services he had performed.

In *Frost vs. Plumb*, 40 Conn., 111, the defendant hired a horse of the plaintiff, to drive from Waterbury to Southington, on Sunday. The horse was driven by the defendant ten miles beyond Southington, and it was claimed by the plaintiff that the extra distance the horse was driven, coupled with immoderate driving, caused its death. The action was brought to recover the value of the horse; and the trial court instructed the jury, that the defendant was not liable, although the injury occurred in going to a different place, and beyond the limits specified in the contract. The supreme court held the instruction was erroneous, and, after a review of the authorities bearing on the question, said:

"Thus it will be seen that the law of Massachusetts on this subject is now in substantial harmony with the law of Maine and New Hampshire. We think that the law of this state ought to be, and is, the same. * * * We understand the rule to be this:—the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*, his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover. Apply that rule to this case. It was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion; and proof that the injury which caused his death occurred while being driven without the consent of the owner, shows a complete cause of action without any reference to an illegal contract."

The grounds upon which McMullen is entitled to recover in this suit have been established and repeatedly declared by this court and by other courts of the Union, both federal and state. McMullen does not ask for the declaration of any new principle of law, but simply that there shall

be applied to his case principles which are too firmly fixed to be the subject of disturbance.

Counsel for McMullen have relied upon the decision in *Brooks vs. Martin*, 2 Wall., 70, and other decisions of this court announcing the same views as those there expressed, as absolutely controlling the proper determination of this cause, and although the circuit court of appeals attempted to draw a line of distinction between the question involved in *Brooks vs. Martin* and that involved in the pending suit, our confidence in the soundness of our contention has not been in the slightest degree shaken. It was upon the ground of a departure from the rule laid down in *Brooks vs. Martin* and other decisions of this court that the writ of certiorari in this case was sought.

In his dissenting opinion in *Burck vs. Taylor*, 152 U. S., 634, Mr. Justice Jackson said on page 670:

"The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassments in the administration of the law."

If we substitute the word "cases" for the word "decisions" above, the language used is exceedingly appropriate to the cause under consideration, and we feel assured that the court will see the fitting application of the statement to the

facts of the pending cause. We submit a review of the decisions on which we rely, for the purpose of showing the utter impossibility of distinguishing this case from those by which we contend it is controlled.

In *Brooks vs. Martin* the facts were that Brooks, Martin and Field had entered into a partnership agreement to engage in a business which this court explicitly declared to be inherently unlawful, and the fruits of the business, which became the subject of the controversy between them, were the direct wages of iniquity. Martin sued for an account of the partnership transactions and to recover his share of the profits. He prevailed, and the fundamental principles on which he succeeded were, that his cause of suit was a property right which grew out of his partnership relation with Brooks, and that his share of the profits, which were in Brooks' possession, was held by the latter in trust, and it did not lie in his mouth to question the source from which the profits had come. The corrupt agreement between the partners did not afford nor restrict the cause of suit, although it was necessarily referred to by the court for the purpose of ascertaining the proportions and manner of the division of the assets which was decreed.

Mr. Justice Miller, who delivered the opinion of the court, said (pp. 78, 79):

"We think that, in point of fact, the allegation of the answer,—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance accord-

ing to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell vs. Wheeler* [17 Mass., 281], *Sheffner vs. Gordon* [12 East, 304], *Belding vs. Pitkin* [2 Caines, 149], and the others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier?

It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

The learned justice then cited with approval *Sharp vs. Taylor*, 2 Ph. Ch., 801, and concluded that the decree of the lower court was correct.

Now, while it is not so declared in terms, it is incontestably clear that the court decided this cause on the ground laid down by Mr. Carpenter, respondent's counsel, in his brief, that "the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction." Thus the doctrine for which we contend above as to what is to be deemed the "cause of suit" in such cases must be held to have been involved in the controversy in that suit and to have been applied in its determination.

Brooks vs. Martin followed *McBlair vs. Gibbes*, 17 How., 232, and since has been followed by this court without question, and the rule laid down

has been applied to a variety of controversies. The first case of prominence succeeding it was that of *Planters' Bank vs. Union Bank*, 16 Wall., 483. The Planters' Bank of Natchez, during the civil war, sent to the Union Bank of New Orleans a lot of Confederate securities to be disposed of for account of the former bank. This was done, and the Union Bank failing to make settlement, the Planters' Bank brought suit in a state court to recover the amount which had been realized. The Union Bank pleaded in defense that the traffic was in aid of the Confederate government and was consequently illegal. On writ of error this court said by Mr. Justice Strong (p. 499):

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plain-

tiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

And in *Railroad Company vs. Durant*, 95 U. S., 576, certain tracts of land had been conveyed in trust to Durant, as vice-president of the Union Pacific Railroad Company, in consideration of the location of the Omaha terminus of the road at a particular point. The railway company contended that the lands were held in trust for it, and, upon Durant's refusal to convey, sued to recover them. The lower court dismissed the bill upon a finding that the conveyances were obtained through an illegal exercise by Durant of his power and position, as acting president and acting manager, and that he held the land of said company in trust for the grantors. This court reversed the decree, saying (p. 578):

"The conveyances to the trustee were, in the view of the law, the same thing as if they had been

to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company. In that obligation there is no pretense for saying there is any taint of any kind; and it is that obligation alone which it is sought to enforce by this proceeding."

In the ninth circuit, before the establishment of the courts of appeals, the rule of *Brooks vs. Martin* was recognized by Judge Sawyer. In *Burke vs. Flood*, 6 Saw., 220, a matter of a partnership accounting arose in a case where it was alleged that a fraud had been perpetrated by Flood and his associates upon a third person, and it is said (p. 227):

"When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves." (*McBlair vs. Gibbes*, 17 How., 237).

The learned judge then quotes from *Brooks vs. Martin* and applies the decision to the case then in hand.

In the eighth circuit the courts have had occasion to apply the rule. In *Western Union Telegraph Company vs. Union Pacific Railway Company*, 1 McCrary, 418, 558, the complainant filed a bill

alleging a contract between the parties, whereby the complainant had the right to maintain a telegraphic line along the defendant's right of way, and it was alleged that defendant was interfering with the right thus conferred and threatening to cut the wires which complainant had strung, in consequence of which an injunction was prayed. The contract contained stipulations that the officers of the railway company should have free use of the complainant's wires for their private affairs, and this provision was held to be against public policy, and therefore to avoid the entire contract. A demurrer to the bill was sustained, with leave to amend. In the amended bill it was set forth that certain property rights had been acquired by the complainant under the contract, and it was contended that the court should protect these rights. This view was sustained, McCrary, J., saying (p. 562):

"Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the Supreme Court of the United States."

After citing with approval *Planters' Bank vs. Union Bank*, *McBlair vs. Gibbes*, and *Brooks vs. Martin*, the opinion proceeds (p. 563) as follows:

"In *Brooks vs. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an act of Congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract, it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract, and those in which a court is asked to deal with property which has been acquired as the result of the execution therof. Such property may constitute the subject-matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired."

It will be observed that the rule of *Brooks vs. Martin* was applied in this case to property acquired under a contract which was still executory.

Another application of the same rule is to be found in *Wann vs. Kelly*, 2 McCrary, 628, where the parties to the suit, together with a third party, engaged in a stock-gambling transaction which proved profitable. Kelly got the proceeds and refused to account to Wann for his share; whereupon the action was instituted. The court (Nelson, J.) found in favor of the plaintiff, saying (p 630):

"It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it.

"If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished.

"It is settled by the United States Supreme court (*McBlair vs. Gibbes*, 17 How., 237; *Brooks vs. Martin*, 2 Wall., 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates."

In the opinion rendered by Judge Bellinger on the final hearing, in which he candidly admitted he had been misled by his first impressions of the application of certain decisions which had been cited by the respondent,—and it may be said the circuit court of appeals have construed these decisions and relied upon them just as Judge Bel-

linger did in the first instance,—he says, (record, p. 98):

"When these questions were considered by me on the exceptions to the answer (69 Fed. R., 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy."

We have quoted at such length from these decisions for the purpose of showing the different conditions in which the rule under consideration has been applied, governing, as it does, questions of partnership, of agency, of traffic agreements, and of general dealings of one party with another. It is held to apply as well to matters which are *mala in se* as to those which are *mala prohibita* only, and the decisions clearly point out, define and limit the instances in which such defenses as those interposed in *Brooks vs. Martin* and in the pending cause may be made available. *It is only*

when the very thing which embodies the vicious element is open and is brought before the court for action which must be predicated upon it that the defense may be made good.

Now, to the apprehension of counsel for McMullen, nothing could be more absolutely clear and free from doubt than that the rule laid down in *Brooks vs. Martin* controls the pending cause, and that the conclusion reached by the circuit court of appeals cannot stand consistently with that rule. And yet there is a marked difference in the character of the two cases. In *Brooks vs. Martin* the whole purpose and existence of the partnership was inherently unlawful; but it is not so in the pending case. The work contemplated by the city of Portland was lawful, and the city invited proposals for its performance. It was lawful for Hoffman and petitioner to combine their forces for securing and executing the work. Their partnership agreement in its objects was unobjectionable. The contract between the city and Hoffman was in itself a proper one. The only ground of attack upon the entire proceedings is that in the accomplishment of their purposes Hoffman and petitioner did an alleged illegal act, to which act, be it observed, the city of Portland has never intimated an objection. It was essentially a "transaction," in the language of the cases above cited, which was absolutely concluded prior to the 6th day of March, the date of the partnership agreement between Hoffman and petitioner, and prior

to the performance of any substantive work from which the moneys and property which constitute the subject of this suit were earned.

If *Brooks vs. Martin* was well decided, *a fortiori* the same rule should determine the pending cause in McMullen's favor.

The doctrine announced in the foregoing decisions is fully recognized and stated in Lindley on Partnership, 2d Am. ed., vol. 1, pp. *107, *108, where the learned author of that work, now the presiding judge of the court of appeal in chancery in England, says:

"*Tenant vs. Elliot*, and other cases, decided that if A. and B. are parties to an illegal contract, and B. in pursuance thereof pays money to C. for A.'s use, A. can recover this money from C. It follows from this that if two partners, A. and B., enter into an illegal agreement with C., and in pursuance of this agreement C. pays money to D. for the use of A. and B., not only can A. and B. recover this money from D., but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C., instead of paying the money to D., pays it over at once to A. or B. In other words, it follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has

been actually paid to one of the partners for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for a share of what he has received. Upon this principle it was held in *Sharp vs. Taylor*, that a partner was entitled to an account against his co-partner of moneys actually come to the hands of the latter from the employment of a ship in a manner not permitted by the navigation laws."

We have cited above only the decisions of the federal courts, but there are numerous adjudications in the state reports in full accord.

Hipple vs. Rice, 28 Penn. St., 406.
Wright vs. Pipe Line Co., 101 Id., 204.
Gilliam vs. Brown, 43 Miss., 641.
Willson vs. Owen, 30 Mich., 474.
Owen vs. Davis, 1 Bailey Law (S. C.), 315.
Harvey vs. Varney, 98 Mass., 118.

In *Hipple vs. Rice*, one Landis instituted a lottery to dispose of a number of lots of ground, and sold tickets based on chance. One Bigler became the purchaser of a ticket and drew a lot for which Landis made a deed, which recited the lottery and expressed as its consider-

ation "the sum of £3 lawful money to him in hand paid by the said John Bigler, at and before the ensealing and delivery of these presents, for one ticket in the above mentioned lottery." The deed also reserved an annual ground rent. The interest of both the original parties had passed to the parties in action, *and the action was brought upon a covenant of the deed to recover the ground rent reserved in the deed.* Illegality of consideration was pleaded as a defense, but it was held to be of no avail. The court said (p. 412):

"Suppose the original agreement for the sale of tickets illegal, and that the law would arrest the payment of every ticket sold under it, still, if the transaction has been consummated by a deed, can the present defendant, for his purposes, go behind it? Although it recites the agreement, I hold that it having been accepted, and possession taken under it, he is estopped from taking advantage of the recitals to enable him to evade the payment of the quit-rents mentioned in it. In *Lestapies vs. Ingraham*, 5 Barr, 81-82, it is said, 'that, while a court will not enforce an illegal contract, yet if the parties themselves execute it, and the illegal object has been accomplished, the money or thing which was the price of it, may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin.' "

In *Gilliam vs. Brown*,43 Miss., 641, William T. Brown entrusted to James C. Brown a lot of cotton

for sale. The transaction occurred during the war, when dealing in cotton was forbidden by the Union authorities. James C. Brown sold the cotton and failed the pay the proceeds over. He having died, William T. Brown brought an action against the executor, James O. Brown, who defended on the ground that the transaction was illegal. The court said (p. 659);

"It is not disputed that a remedy will not lie on the illegal contract itself. If J. C. Brown had obligated himself to carry W. C. Brown's cotton into Memphis, and sell it, no suit could be sustained for a non-performance. But where the illegal adventure has been accomplished, and the money arising out of it is in the hands of J. C. Brown, or his legal representative, what law is violated, what rule of public policy is infringed, what encouragement is given to the violators of the law, by compelling him to turn over the money to his principal?"

On page 664 it is further said:

"But the principle seems to be well established that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and, therefore, the plaintiff, jointly interested in its profits and gains, cannot ground any claim to an account and share there-

of. All the harm that can inure to the public by an infraction of law has already accrued; and it were to encourage hypocrisy and gross dishonesty to permit a party fresh from a violation of the law, to set up his own turpitude as a shield and protection against a division of the gains of the illicit business with one jointly entitled to share them."

So also in *Owen vs. Davis*, 1 Bailey Law (S. C.), 315, one Murray lost money at cards to Owen and Davis, and gave his note to Davis therefor. Davis realized on the note and declined to divide with Owen, setting up as a defense when sued that the consideration for the note was illegal. Speaking of the decision of the trial court, the supreme court of South Carolina said (p. 316):

"The presiding Judge was of opinion, that the illegality of the consideration, for which Murray had given his note, did not affect the question between the present parties. If Murray chose to waive the objection, it did not lie with the defendant to set it up, for the purpose of retaining the whole of the spoil to himself. One, who receives money to the use of another on an illegal contract, cannot retain it to his own use, on the ground of the illegality of the contract. *Tenant vs. Elliott*, 1 Bos. & Pul., 3; *Farmer vs. Russell*, Ib., 296. If the defendant had received money, of which, by an agreement between themselves, the plaintiff was entitled to one-half, it was difficult to discover any sound principle, on which the fact, that it had been received on an illegal contract, would entitle the

defendant to violate his own agreement. The money received might, indeed, be well termed the wages of iniquity; but why should one of the co-workers be permitted to add a fresh iniquity, by retaining the whole, contrary to his agreement? No good reason could be given. Murray would have been protected in refusing to pay; but as he *had* paid, the plaintiff was certainly entitled to recover his share of the fund, unless, indeed, Murray might himself recover back the whole."

The supreme court simply said (p. 320):

"We concur in the views taken of this case by the presiding Judge."

In *Willson vs. Owen*, 30 Mich., 474, the parties to the action, with others, organized a horse fair association and conducted races and pool-selling upon which they made money. Owen was treasurer and refused to divide the earnings of the enterprise with his associates. When sued he set up as a defense the illegality of the operations through which the earnings were made. He lost his case below. On appeal, Cooley, J., speaking for the court, said, (p. 475):

"We also think the court below decided correctly in overruling the objection to the action on the ground that the moneys demanded were received in the prosecution of an unlawful undertaking. It is true that the trials of speed for

money at the horse fair, and the selling of pools under the auspices of the association, were illegal; but there is no illegality in the promise, express or implied, of the defendant, to pay over to the plaintiffs the moneys received for them from whatever source derived, or from whatever transactions springing. In *Bronson Agricultural, etc., Association vs. Ramsdell*, 24 Mich., 441, the attempt was made to enforce the illegal contract by a suit to recover the moneys promised by it; but this suit involves no such attempt. The illegality of this association only appears incidentally in explaining whence the moneys were received; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiffs' use. The distinction between such a case and one in which the suit seeks the enforcement of the illegal contract is well pointed out by *Mr. Justice Nelson* in *McBlair vs. Gibbes*, 17 How., 235, 239, where *Tenant vs. Elliott*, 1 B. and P., 3; *Farmer vs. Russell*, 1 B. and P., 296; *Thomson vs. Thomson*, 7 Ves., 470; and *Sharp vs. Taylor*, 2 Ph. Ch., 801, are cited with approval. See also *Brooks vs. Martin*, 2 Wall., 70; *Murray vs. Vanderbilt*, 39 Barb., 141. These cases are directly in point, and meet with our approval."

In *Harvey vs. Varney*, 98 Mass., 118, the suit was for an accounting between partners. The partners who were made parties defend-

ant therein contested the plaintiff's claim on the ground that the property with which the firm had been operating, was acquired by the firm through a conveyance made to defraud the creditors of the prior owners of the property. The supreme court said (p. 119):

"We are satisfied that the firm of Varney & Harvey was formed in part at least for the purpose of transferring to it the property of the former firm of Hunt & Lane in order to hinder, delay and defraud its creditors; that the property sold to it by Hunt & Lane was intended to be concealed and covered up from attachment; and that the interests of Hunt & Lane in the new co-partnership of Varney & Harvey was kept secret, and their names were omitted from the books of the new firm as co-partners, with the same view and design and that all this was done with the knowledge and participation of the plaintiff.

"These facts being established, it is insisted on behalf of the defendants that the whole business was fraudulent and illegal, and that a court of justice will not interfere, between parties equally guilty, to adjust their controversies and apportion the shares to which they are respectively entitled accruing from a fraudulent, illegal and immoral enterprise. The principle invoked is well established, founded upon the highest considerations of public policy, and its maintenance is essential to the dignity of judicial tribunals. Within proper limitations it receives our cordial assent."

And further on in the opinion in that case (p. 123) it is said:

"The result is, that the defendants in equity cannot be allowed to prove that the stock taken from the old firm of Hunt & Lane by the new firm of Varney & Harvey, was transferred to conceal it from attachment; and the notes given therefor are held to be valid.

"The question whether an account between the members of the new partnership should be refused, and each be allowed to retain the share which happens to remain in his hands, without regard to equality, depends upon similar principles.

"There was no element of illegality or immorality in the business of the firm. Because the plaintiff's interest was that of a silent partner, and was kept concealed in order that it might not be attached by his creditors, the defendants who participated in this purpose cannot be allowed to disclose the common fraud of both parties and thereupon appropriate to themselves his share of the capital and profits of the partnership. Except so far as creditors intervene to assert their rights, the interests of the several partners must be adjusted as if no such fraudulent purpose existed. To hold otherwise and to apply to this case the maxim, *in pari delicto potior est conditio defendentis*, would be to exercise rigor beyond the limits of wholesome severity."

The rule applied in the case last quoted from is exactly applicable to the facts appearing in the case at bar. There, as here, the partnership was for a lawful purpose, and collateral matter was sought to be availed of, which was only indirectly connected with the cause of action asserted, in order to defeat a recovery.

Let us apply the principle so universally recognized in the above decisions to the pending case, and analyze the distinction attempted to be drawn by the circuit court of appeals. In their opinion it is said, (record pp. 611-2):

"The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be

proved without reference to it, then he is entitled to recover.

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light."

The court here lay down as cases in which a party cannot recover money connected with an illegal transaction the following:

1. Those in which the plaintiff is obliged to show the illegal contract or transaction in presenting his case.

2. Those in which he must make out his case through the medium of the illegal contract or transaction.

3. Those in which it appears he was privy to the original illegal contract or transaction.

The single instance in which he may recover is said to be where there is a new contract, remotely connected with the illegal contract or transaction, and the right to recover is not dependent upon that contract, *but the case must be proved without reference to it.*

The second only of the above propositions is sound.

In *Brooks vs. Martin* the plaintiff was obliged to show the illegal contract, because it measured the amount of his recovery and was indispensable evidence. So, in many cases, although the plaintiff's cause is not grounded upon the illegal contract, he may have to resort to it in evidence for a like purpose, or to identify the subject of the suit, or to establish the time within which something was to be done. An unstamped deed, where a stamp is required, cannot be used to support a claim to the property attempted to be conveyed, but it may be referred to in evidence for a description of the property, or to show when possession of the premises commenced. It is therefore error to say that no recovery can be had where the plaintiff in making his case is simply required "to show" the illegal contract.

Frost vs. Plumb, 40 Conn., 111, cited above is exactly in point. The court say (p. 113):

"We understand the rule to be this:—the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*,

his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, *although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case*, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal." (Last italics ours.)

Note also the case of *Hipple vs. Rice*, *supra*, where the suit was brought upon a deed which had emblazoned on its face the obnoxious matters which were urged in defense of the recovery sought.

In every one of the cases cited by us it was made to appear, in one way or another, that the plaintiff was privy to an "original illegal contract or transaction," and yet a recovery was not precluded by reason thereof.

The single instance in which, under these rules, the court of appeals allow that a recovery may be had would have absolutely cut off all recovery in *Brooks vs. Martin.*

The circuit court of appeals say in the quotation made above from their opinion:

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest."

Inferentially, of course, it was the view of the court that this doctrine did not apply to cases where the public was concerned; *ergo*, that it had no application to the pending suit.

Conceding for the argument that in the matter under consideration the city of Portland stood for the public, we ask in the name of reason if the public interest was not affected in *Brooks vs. Martin* by the parties violating an act of congress, or in *Hipple vs. Rice* by their violating a statute of Pennsylvania; was not the public interest concerned in *Planters' Bank vs. Union Bank* and in *Gilliam vs. Brown*, where the parties were dealing in securities and property contraband of war; was not the public interest touched in *Railroad Company vs. Durant* and *Western Union Telegraph Company vs. Union Pacific Railway Company*, where officers of corporations were guilty of making a private advantage out of their positions at the expense of their associates?

From such a narrow and faulty conception of the doctrine of these cases, it need not be a mat- of surprise that the circuit court of appeals thought they were not applicable to the pending controversy.

In every one of these cases the question of public policy was presented and in every one of them it was recognized that this question would have led to a different result in some other stage or aspect of the controversies. It was as present

in every one of them and as pertinent to their determination as it is in the pending suit.

What is public policy, and under what circumstances may the plea be invoked? We say that public policy is public morals. If there were any distinction between public and private transactions in the matter of its application we should say that it was primarily applicable, to matters of the first class, but there is no distinction. It is applicable to both classes alike, and to neither, except when some beneficial lesson is to be enforced by the application. It is never applied where the primary wrong being beyond reach, its enforcement would but aid in the perpetration of another.

In Greenhood on Public Policy, 2, the author says: "No judge better expressed the importance of the element of public policy in the law than did Wilmot, C. J., when he said: 'It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance *in foro civili*.'

"And another court thus expressed itself: 'We may take it as well settled that, in the law of contracts, the first purpose of the courts is to look to the welfare of the public; and if the en-

forcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement.'"

We take *Brooks vs. Martin*, for purposes of illustration, as a type of the decisions which we have cited. The effect of the act of congress declaring that sales of scrip were void was to make such sales unlawful, and Mr. Justice Miller says that "the traffic in which this firm engaged" was "illegal." Therefore both the partnership agreement and the operations of the firm were unlawful. The subject of their operations, out of which they made their profits, were under the ban of law. The parties were violating public policy and it was involved in the case, for every infraction of law is obnoxious to public policy.

Counsel for respondent attempt to argue, as if it were a distinction of consequence, that in *Brooks vs. Martin* the parties acquired by fraudulent practices their stock in trade which is denominated a "transaction," which did not affect their subsequent operations; while in the pending cause the action of the parties was an inherent part of their contract, constituting a thread which runs through the entire course of their joint operations, and vitiates everything. We think we have conclusively demonstrated that upon respondent's theory the cases are entirely undistinguishable. The matters to which excep-

tion was taken occupy identically the same relation to the other transactions of the parties in the one case as in the other, and if they could not defeat a recovery in *Brooks vs. Martin*, neither can they do so here.

If there was any turpitude in the action of Hoffman and McMullen in the submission of their bids, so far as Hoffman was concerned this was beyond the reach of the court when this suit was brought, for the matters now assailed had been completed and Hoffman had placed beyond recall McMullen's interest in their joint venture.

The learned circuit court of appeals in their opinion undertook to disapprove, apparently upon ethical grounds, of this proposition when it was submitted to them. They say (record, p. 613):

"The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, nor collect any damages for his refusal, 'because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring it into the court, and its character would have been a subject for investigation. But when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead

letter.' If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder —could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become 'a dead letter,' or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract."

We repeat the assertion that " when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter," and we will demonstrate it.

Assuming the respondent's contention as to the transaction between Hoffman and McMullen to be true, for the sake of the argument, the fact remains that when they had despoiled the city, if you please, and had secured a right to the contract which yielded the money in suit, Hoffman did not stop and decline to go further with McMullen. He entered into the engagement of March 6, which was in effect an equitable assignment to McMullen of a half interest in the contract to be entered into between himself and the city of Portland; he delivered to McMullen his

share of the booty in the only way in which it was capable of delivery, and thereafter he stood to McMullen as a trustee of his interest in the city contract, and everything which might be earned under it, and was bound to account to his *cestui que trust* just as any other trustee would have to do in regard to trust property.

In Lewin on Trusts, p. 68, it is said:

"If the settler proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced so soon as the settler has executed an express declaration, of trust intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable,whether it be capable or incapable of transfer."

In Parsons on Contracts, p. 224, speaking of the assignment of *choses in action*, the author of that work says:

"Such an assignment is regarded in equity as a declaration of trust, and an authorization to the assignee to reduce the interest to possession."

So, also, in *McDaniel vs. Maxwell*, 21 Or., 202, 205, speaking of equitable assignments, the court said:

"By such an assignment the assignee obtains an interest in the property or fund, and not simply

a right of action against the drawee. * * * No particular form of words or particular form of instrument is necessary to effect such assignment. Any binding appropriation of it to a particular use is an assignment, or what is the same, a transfer of the ownership."

To the same effect is *Spain vs. Hamilton's Admr.*, 1 Wall, 604, 624, in which this court said:

"Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity."

In *Smith vs. Hubbs*, 1 Fairf., 71, 76, the supreme court of Maine said:

"There is a marked and settled distinction between *executory* and *executed* contracts of a *fraudulent* or *illegal* character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally *contracted to execute*, the law refuses to compel the contractor to execute or pay damages for not executing; but in both cases leaves the parties where it finds them."

In *Ownes vs. Ownes*, 23 N. J. Eq., 60, the complainant brought suit for a re-conveyance of cer-

tain real property which she had conveyed to her son James H. Ownes, he having executed a declaration that he held the property in trust for her. The defendants, who were the administrators of the estate of James H. Ownes, then deceased, alleged that the property was conveyed to James H. Ownes by the complainant for the purpose of delaying and defrauding her creditors, and it was contended, that such being the case, the court could not grant the relief sought. But the supreme court said (p. 62):

"If the instrument executed by James had been a mere contract to re-convey the property, or the bill had been filed to establish a trust, either as a resulting trust, or on a parol agreement, the defense would be a bar to the relief. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se, or malum prohibitum.* It would not create a trust in such case. But here the trust is declared by a writing executed and delivered. The estate is vested in the complainant, and the object of the suit is to compel a naked trustee to convey the property held in trust to the *cestui que trust*—to perform an existing trust.

"Courts of equity, in the analogous cases of contracts and conveyances without consideration, have recognized and established this distinction between conveyances and executory contracts: Where the title is vested, they never avoid it for

want of consideration. And, on the other hand, they never enforce an executory contract without consideration; they treat it as a nullity. * * *

"The maxim, *in pari delicto, potior est conditio possidentis*, protects the title actually vested in the complainant. If the legal estate had been reconveyed to the complainant, the title could not have been affected by the fraud of the transaction from which the conveyance arose. And the rule must be the same when the equitable estate has been actually vested by a proper conveyance. I know of no case in which a court of equity has refused to enforce a trust actually declared and vested, on account of fraud in the conveyance to the trustee who declared the trust."

Was not the effect of Hoffman's signing the partnership agreement to fully consummate the alleged fraudulent transaction upon which the respondent bases her defense? Did not the "stroke of the pen" perform a substantive office here? And does not the attitude of the respondent call upon the court to exercise affirmative action on her behalf in undoing what Hoffman had done?

Hoffman by signing this agreement supplied McMullen with the means of proof of his interest in the contract with the city. They had gotten past the illegal feature of their operations. Suppose Hoffman and McMullen had joined in a sale of their contract with the city to a third person and the money had been paid to Hoffman, would

the matters which he set up in this case have been any defense to an action brought by McMullen for his share of the proceeds? And how does the case differ because instead of doing this they worked out the contract and the money earned was paid over to Hoffman by the city?

May we not go even another step and say that, inasmuch as the further business to be performed by Hoffman and McMullen was unobjectionable, if no joint action had thereafter been taken between them, but Hoffman having the contract with the city in his name had himself sold it to a third person and realized a sum of money upon the sale, could not McMullen have sued for his interest, giving in evidence the partnership contract as supporting his demand, and recovered? The authorities cited above, leading up to and including the New Jersey decision, certainly support this proposition and we see no reason to question its soundness.

We thus see that if the action of the parties had not gone to the extent of giving McMullen a right to recover upon the hypothesis first presented, he could have made his approach by this additional line of argument and equally have secured his interest in the contract.

The authorities relied upon by the circuit court of appeals as a basis for their decision are clearly to be distinguished from the pending case and are inapplicable to the true issues joined herein.

It would not be worth while to review all the authorities which are cited in the opinion of the circuit court of appeals as the basis of their decision, and we shall therefore content ourselves with an examination of those which seem to have appealed most forcibly to the court. The first and strongest of these cases apparently is that of *Atcheson vs. Mallon*, 43 N. Y., 147. Of this case the circuit court of appeals say (record, pp. 602-3):

"This case, in principle, cannot, in our opinion, be distinguished from *Atcheson vs. Mallon*, *supra*, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to $400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said:

"'If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but be-

cause its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action; while Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce.'"

Conceding that this case was well decided, we submit that the circuit court of appeals were mistaken in accepting it as a guide for their action in the pending cause. The statement of facts given in the report is this:

"The action was for an accounting, and the payment to the plaintiff of his share of the profits realized by the defendant on a certain contract with the town of Oswegatchie, St. Lawrence County, for the collection of the taxes assessed upon that town.

"By an act of the legislature passed March 9th, 1866 (Sess. Laws of 1866, vol. 1, p. 244), the board of town auditors of that town were authorized to receive sealed proposals for the collection of the taxes of that town, and award the collection

thereof to the person offering terms most favorable to the town.

"The board accordingly advertised, and, among others, both the plaintiff and the defendant put in proposals. Their proposals were seen by both the parties, before they were sent in, but it did not appear that any change was made in either of them, in consequence of the knowledge by one bidder of the proposal of the other.

"At the time the proposals were sent in to the board of auditors, the plaintiff and defendant agreed that, if either obtained the award of the collection of taxes, both should share equally in the profits and be liable to an equal share of the losses.

"The contract was awarded to the defendant, who went on under it and collected the taxes at the rates stated in his proposal."

Now it is perfectly manifest that these parties never launched their proposed partnership, if indeed it can be termed a partnership. We are told that the *defendant* went on under the contract and collected the taxes, and that the *defendant* realized the profit. There is not the slightest suggestion that the defendant had ever recognized the plaintiff in any manner whatever after they entered into their *agreement to become partners;* the parties had not performed the work together, nor does it appear that they ever intended to do so; and they had never sustained any

such *relationship* as partners as would raise an implied promise on the part of the defendant to pay over to the plaintiff any part of the earned profit. The action was brought on an *agreement to stand to each other in the matter of profit and loss as partners*, and the very authorities upon which we rely for a recovery in this case show that upon such a cause of action as that no recovery can be had. The decision is in nowise opposed to the principle involved in our authorities, and presents no ground for denying McMullen's right to a decree. Read in the light of the facts to which it applies, as it must be, this decision carries no weight in the determination of the controversy before the court.

Take the case of *Swan vs. Chorpenning*, 20 Cal., 182, which the circuit court of appeals say (record, p. 601) cannot "be distinguished in principle" from the case under consideration. The character of the controversy as given in the report is introduced with this statement: "The contract, *for the breach of which this action is brought*, was a verbal one, and is stated in the complaint as follows." Thereupon is given a copy of the complaint, from which it appears in brief that both parties were mail contractors, that plaintiff had submitted a bid on a certain mail route which he agreed to withdraw, so as to throw the contract to defendant, in consideration that the defendant would divide with him the contract price for carrying the mail, or would pay him an equiva-

lent in money. The plaintiff carried out his part of the contract, but the defendant refused to perform his promise, *and the plaintiff sued him for breach of his contract.* Here nothing further had been done between the parties, and when the plaintiff sued on this contract the defendant had only to plead that the contract was grounded upon an illegal consideration.

Referring to the two cases last considered the circuit court of appeals say (record, p. 603):

"Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah vs. Fife.*" [27 Mich., 172]. This is quite true, for this decision has no more bearing upon the controversy than the other two. The action was brought directly on a contract which expressed on its face all the details of the transaction which were held by the court to be fraudulent, the stipulations were wholly executory, and they constituted the sole consideration for the contract. The fraudulent practices which were held to defeat a recovery were immediately and necessarily brought into court by the plaintiff in seeking the relief he prayed, and they entered directly into his cause of action,—in fact the fraudulent contract furnished his *cause of action.* The opinion recites (p. 177) that, "the introduction of the contract in evidence was objected to on this ground," *i. e.* that it disclosed the fraud and the plaintiff's reliance on it; or, in other words, the point was made that the plaintiff could not

get before the court without showing his fraud and asking the court to administer upon it. The court being required by the exigencies of the plaintiff's case to pass judgment on the executory provisions of this contract, held that it was void and would not support the action.

King vs. Winants, 71 N. C., 469, would seem to have made a strong impression upon the circuit court of appeals, as its language is freely borrowed in their opinion. The recital of the facts is given in the opening of the opinion as follows:

"The care and maintenance of certain sick persons in the service of the United States, and of the sick of the city of Wilmington, and of the county of New Hanover, were let to the lowest bidder by the several governments, and the plaintiff and defendant, who were rival bidders for the same, entered into a contract not to bid against each other, so as to enable one or both to get the contract at a much higher rate, and divide the profits between them. It is not denied that this was a fraud upon these governments, and against public policy, and that the contracts could not have been enforced against those governments. But the contracts having been performed by the governments, and the parties coming now to settle the profits between themselves, and being unable to agree, it is insisted that the aid of the courts may be invoked. And whether that can be, is the question."

Now, for aught that appears here, the parties were in the same situation that Atcheson and Mallon occupied towards each other. It does not appear that they had performed the work together,—that they had ever assumed the relation of partners,—or that the defendant had recognized the plaintiff as an associate at any time after they had entered into the contract. Quite apparently here, as in *Atcheson vs. Mallon*, the plaintiff sued the defendant *on their agreement to become partners*, which constituted his cause of suit, and the defendant pleaded to this contract that it was grounded upon an illegal consideration. It is only in a suit of this character that any room would have been afforded for the language of the opinion wherein it is said (p. 471): "We are asked to go into all the transaction and hear all the evidence and even their own conflicting statements as to the precise manner in which they bargained with each other, and which was most faithless to the other, and which got the best share of the spoils, and to help them make a just division." When the circuit court of appeals adopted this language and applied it to the pending case, they failed to note the manifest difference in the facts of the two cases. The language of the North Carolina court was all right as applied to the case before them, but it was quite out of place when applied to the case before the circuit court of appeals. We pass this opinion upon *King vs. Winants:* That if the facts of the case

are as they appear to be from the report, it is easily to be distinguished from *Brooks vs. Martin* and from this case, and it was rightly decided; if they go beyond the recital in the report, the decision is at variance with *Brooks vs. Martin* and is wrong.

The circuit court of appeals adopt this illustration given by the North Carolina court as affording a test by which the pending cause is to be judged (record, p. 612):

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks vs. Martin*, *supra*, so much relied on by plaintiff."

If any parallel can be drawn between a case involving a flagrant breach of the peace and an

infraction of a criminal statute, and a case in which a general offense against public policy is presented, we submit that this illustration makes for McMullen. Under the rule laid down in *Brooks vs. Martin* and the facts of that case, an investment of the proceeds having actually been made and a profit earned, it is entirely immaterial whether these men originally entered into a conspiracy both to rob and to invest the proceeds of their robbery, or whether they agreed in the first instance only to rob, and the investment of the proceeds did not come under consideration until after they had realized them. *Brooks vs. Martin* covers the first aspect of the case and necessarily covers the second. The case, as stated, is a good illustration of the point to which it is addressed, but it does not help the respondent at all. The first contingency is *Atcheson vs. Mallon*, the second *Brooks vs. Martin* and this case. The illustration may also be taken as giving further point to the conclusion that King and Winants did not go beyond the stage of an original agreement to procure their contracts by fraudulent means, and had not jointly performed these contracts, nor entered into the relationship of partners in connection with them.

The decisions reviewed above are typical of all those relied upon by the respondent and adopted by the circuit court of appeals. In all of them there was a direct and successful agreement *to stifle competition;* and we believe we are safe in

making the assertion that in all the cases cited by counsel for respondent the subject of the suit was so closely connected with the fraudulent transactions involved, that the plaintiff was compelled to bring them before the court as the ground of his claim, or else there was presented the simple case of a promise founded on an illegal consideration which the defendant was allowed to plead.

We do not deny that the cases were well decided, but they are in no sense whatever inharmonious with those upon which we rely, the difference between the two classes of decisions being that those cited by respondent, when rightly understood, have no application to the facts of the pending cause, while those cited by us absolutely control it. In passing upon the questions before them, the courts in the adjudications cited for respondent lay down general principles which at first blush seem to apply to the case in hand, and they were so accepted in the first instance by Judge Bellinger; but of course their force depends entirely upon the conditions to which they apply, and when this dissimilarity of conditions is taken into account the inapplicability of the decisions is at once seen. A failure to discriminate in this respect led the learned circuit court of appeals into an error.

The respondent's view of the character of the association which existed between Hoffman and McMullen cannot lead to any different result

from that which must follow the interpretation of their relationship contended for by McMullen.

In an earlier part of our argument we alluded to the fact that the parties disagree as to the manner or extent in which the matters brought into the case by respondent, entered into the relationship between Hoffman and McMullen. The disagreement is this:

McMullen contends that the object and scope of his two engagements with Hoffman, or conceding them to be one for the sake of the argument, were to accomplish legtimate ends,—that they entered into a lawful association to execute a contract with the city of Portland for work which was unobjectionable in its character,—and that if there was any semblance of truth in the matters set up by the respondent as a defense, it was at most the performance of an illegal act in the prosecution of a legal business; that it was a *transaction* incidentally connected with their *contract*. On the other hand, the respondent contends that the manner of bidding and the objects which she says were had in view between McMullen and Hoffman entered into and became part and parcel of their partnership contract. If the contention of the respondent could be accepted, its only effect would be to establish a similitude between the facts of this case and those of *Brooks vs. Martin*, and possibly to fasten the application of that decision more securely upon this controversy. McMullen contends that, upon his theory,

the rule laid down in *Brooks vs. Martin* must govern, although there would be far more reason for applying the rule to his case than there was for applying it to that controversy; while, upon respondent's theory, it would still be absolutely impossible for her to escape from this rule.

We understand the idea of respondent's counsel to be this:—That Hoffman and McMullen entered into a contract to do two things,— (1) secure a contract from the city of Portland by fraud, and (2), to perform this contract when secured; that one partnership agreement covered the whole scope of the operations which were contemplated and executed between them; and that the illegal feature of their agreement contaminated the whole and rendered the entire partnership association, and every part of it, void and unenforceable between the parties.

In answering this contention we will not be understood as abandoning in any degree our position that the partnership contract is not the cause of suit, that McMullen is not suing upon the contract for its enforcement, but is suing to recover his interest in a fund which was earned jointly by Hoffman and himself acting in the relationship which the partnership contract contemplated they would enter into.

It will be borne in mind that in *Brooks vs. Martin* the partnership contract was exactly what the respondent claims the contract in this case

is,—the parties were to secure soldiers' land claims in violation of law and dispose of the lands and divide the profits, which last things in themselves violated no law.

Taking up this contention of respondent and going back to the original engagement between Hoffman and McMullen, we submit that if there had been any fraud or illegality in that portion of their agreement by which they were to bid jointly, this would not affect the other portion by which they were, if they got a contract, to become partners for the performance of the work, conceding, for the sake of the argument, that the suit is based on the contract.

The two portions are quite distinct and separate, and might, if it had been so desired, have been embodied in separate contracts, made at different times. That such is the case is quite clear when it is considered that if, after the contract for manufacturing and laying the steel pipe had been awarded, Hoffman and McMullen had sublet all of the work, or had sold and assigned the contract to a third party, there would then have been no necessity whatever for them to become partners in order to perform the contract. On the other hand, if the contract for manufacturing and laying the pipe had been awarded to some party other than Hoffman and McMullen, and they had bought the contract from the party to whom it was awarded, they could just as well have become partners and performed the work of

manufacturing and laying the steel pipe, as they could have done, had the contract been awarded to them.

And the promises of Hoffman and McMullen, which constituted the consideration in each of said portions of their agreement, were also distinct and separate, the promise in one portion being absolute, viz., to bid jointly; whilst in the other portion the promise was conditional, viz., if a contract should be awarded on a joint bid put in by them, they would become partners for the performance of the work.

Hence, each portion of said agreement between Hoffman and McMullen was readily severable from the other, and each was substantially a distinct contract which could, if necessary, be enforced quite independently of the other.

In *Oregon Steam Navigation Co. vs. Windsor*, 20 Wall, 70, 71, it is said:

"And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable

of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.' The cases cited in support of this proposition are *Chesman et ux. vs. Nainby*, [2 Strange, 739], *Wood vs. Benson*, [2 Crom. & Jer., 94], *Mallan vs. May*, [11 Meeson & Welsby, 653], *Price vs. Green*, [16 Id., 346], *Nicholls vs. Stretton*, [10 Queen's Bench, 346]. In *Price vs. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls vs. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not after his term expired, be concerned, as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in *Price vs. Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of divis-

ion between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it."

And in *Pickering vs. R. R. Co.*, L. R., 3 C. P., 235, Willes, J., said (p. 250):

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

So, also, in *Bank of Australasia vs. Breillat*, 6 Moore's P. C. C., 200, it is said:

"From Pigot's case (6 Coke's Rep., 26), to the latest authorities, it has always been held, that, when there are contained in the same instrument, distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced though the performance of those which are illegal cannot."

And in *Treadwell, vs. Davis*, 34 Cal., 601, one Thompson turned over certain property to the plaintiff, Treadwell, under an agreement that he

should hold it as security for the payment of the amount due him, and should hold the balance for Toland, another creditor of Thompson, as security for the amount due him. It was claimed by another creditor of Thompson, represented by the defendant, as sheriff, that the agreement between Thompson and Treadwell was void, as being an assignment for the benefit of creditors, in contravention of the insolvent laws, and that he could take the property under an execution against Thompson. But the supreme court held otherwise, and said (p. 605):

"For, if the plaintiff's agreement to hold the surplus for Toland were conceded to be void, as in contravention of the Insolvent Laws, it would not invalidate the plaintiff's lien. The contract consisted of two distinct parts, readily severable, They are not so united that they must stand or fall together. In such cases the rule is well settled that the court will enforce that part of the contract which is valid. We have seen that the plaintiff acquired a valid lien for his own protection, which entitled him to the possession of the property; and if that part of the contract which related to the surplus be void, the other was not thereby invalidated."

Again. in *Erie R. R. Co. vs. Union L. & E. Co.*, 35 N. J. L., 240, it is said (p. 245):

" * * * Let it be granted that the provision in question is illegal, and therefore void,

still such concession cannot, in the least degree, impair the plaintiff's right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists. Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 *Henry VIII.*, 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law are void *ab*

initio, and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed."

It is clear, therefore, that if there had been any illegality in the agreement between Hoffman and McMullen to bid together, or any fraud on their part in obtaining the contract with the City of Portland, that could not affect the validity of their agreement to become partners if a contract should be awarded, or have any effect upon the partnership obligations or transactions in the business of manufacturing and laying steel pipe and doing other work in connection with the construction of water works for said city. On this theory of the case, it can be positively asserted, that if such had been the cause of suit, Hoffman and McMullen having voluntarily performed the illegal part of their contract without asking the aid of any court in the matter of its performance, that engagement is out of the case and could not enter into a suit which asked only the enforcement of legal stipulations.

We now submit that the record entirely fails to show anything in the transactions or contract between Hoffman and McMullen which was actually or constructively fraudulent, and that there is nothing in the record which can upon any hypothesis be taken as affording any ground for denying to McMullen his interest in the fund in suit.

The great difficulty which counsel for McMullen have experienced upon this branch of the case has been to get counsel for respondent to point out in just what particular the alleged fraud between the parties is to be found. It has at one time been located in the bidding, at another in the contract between the parties, and again in the contract between Hoffman and the city of Portland, both of which have been characterized in this connection as "illegal" contracts. The answer charges these transactions as embodying the fraud which Hoffman pleaded in defense, viz:

1. That in order that Hoffman and McMullen might get a contract at the highest possible figure, they agreed that each party should bid an amount known to both.

2. That in pursuance of this agreement Hoffman submitted a bid $13,000 lower in amount than he had previously intended bidding, and McMullen put in a bid $98,000 higher in amount than he had previously intended bidding.

3. That the parties intended by their action to require the city of Portland to pay more for the work than it would otherwise have been required to pay.

4. That the parties arranged their bids on the various classes of work, so as not to operate as competing bids, while appearing to be so.

5. That in bidding on the item of manufacturing and laying the pipe and the item of furnish-

ing the plates, it was agreed that if Hoffman's bid should be the lowest on the first, and McMullen's the lowest on the second, with Hoffman's bid on this item as next lowest, McMullen would decline to accept the work on his bid and thereby induce the city to take Hoffman's higher bid, and so with other portions of the work.

6. That "complainant" (McMullen) being desirous of getting a contract on the submerged pipe, had proposed to Hoffman to resort to fraudulent practices to accomplish his end.

This is all there is of the answer, and the last charge was stricken out of the case by the trial court.

The charges of fraud in the record, therefore, are, that McMullen and Hoffman so arranged their bids as to make the city pay a higher price than it otherwise would have had to pay, and that they intended to effect certain combinations of bids to the city's detriment.

It will be observed that while much has been said all through this case in regard to the intention of the parties by their double bidding to mislead the city into believing that Hoffman's bid on the work in controversy was a desirable one in comparison with the much higher bid of McMullen, there is no suggestion in the answer of any such purpose.

In proceeding to answer the charges which confront us, we say that they are to be determined in the light of the following principles, viz:

1. That fraud is never to be presumed.

2. That fraud is a question of intent, either express, or to be accepted as a presumption from the character of acts.

3. That the burden of proving the existence of fraud in any transaction rests on him who alleges it.

4. That in order to prove fraud the evidence must be clear and convincing.

5. That where an act is susceptible of two constructions, one that it was honest, and the other that it was fraudulent, the former is to prevail.

We will first take up the matter of the alleged combination bidding, as that is most quickly disposed of. The whole support of the answer in this particular is to be found in the testimony of respondent's witness, Bush. He testifies as follows:

"Q. Now, have you had any conversation, or heard any conversation between Mr. McMullen and Mr. Hoffman about bidding for this work, and if so, I wish you would state what it was.

"A. Well, they had various conversations about the bidding—that they would bid together,

so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest, or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing (record, p. 266) the plates, so that there might be a change [chance] to combine those two bids on both those two items.

"Q. State as nearly as you can, Mr. Bush, what was said by Mr. Hoffman and by Mr. McMullen as to the manner in which they would each bid—what should be done, giving all the particulars of it as nearly you can, what they said and if you cannot remember their language give it as nearly as you can.

"A. Well, there was a great many conversations in my presence, the general idea being that they would each bid.

"Q. Go on and state what it was.

"A. Each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacture and laying, and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was

the day the bids should be opened; that combination they were making to get as much of the work as possible. (Record, p. 267.)

"Q. In what way?

"A. By combining Lee Hoffman's bid on the manufacture and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that combination—the Hoffman & Bates' bid on the manufacture and laying, and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company *was to try to withdraw their bid on the delivery of the plates, so that the whole work should go to Hoffman & Bates.* (Record, p. 268.)

"Q. We will put it in another way; was there any agreement or understanding between Mr. McMullen and Mr. Hoffman as to what McMullen should do, or the San Francisco Bridge Company should do, in case their bid for the steel plates was the next lowest to the bid of Hoffman & Bates—as to the San Francisco Bridge Company withdrawing from the bid, or trying to withdraw from the bid and let the work go to Hoffman & Bates?

"A. Well, there was some talk of either one of them withdrawing, if by doing so they could combine the bids to better advantage or get more work.

"Q. Well, you may state as nearly as you can, Mr. Bush, what agreement was had between them upon that subject.

"A. *The agreement was about a combination of the bids on the two items of manufacturing and laying and the delivery of the plates;* that those two items should be combined in the two bids in the best way that they could to get the most money out of the job; that in case the San Francisco Bridge Company's bid for the plates combined with the Hoffman & Bates' bid for the manufacture and laying made the lowest total, then the bid should be combined, and in case there was no bid between those two bids—between that total I have just spoken of—the total of the Hoffman & Bates bid on the manufacture and laying and the San Francisco Bridge Company on the delivery of the plates, then the San Francisco Bridge Company should withdraw their bids for the plates.

"Q. That could not only be ascertained when the bids were opened?

"A. Yes, sir. (Record, p. 270.)

"Q. Then, if I understand you, if it was ascertained upon opening the bids that the bid of Hoffman & Bates should prove to be the lowest bid for the manufacture and laying of the pipe, and the bid of McMullen, or the San Francisco Bridge Company, should prove to be the lowest for furnishing the plates, and that those two to-

gether would make the lowest total, it was agreed that the San Francisco Bridge Company SHOULD ENDEAVOR, IF THEY COULD, TO GET RELIEVED FROM THEIR BID, and let Hoffman & Bates take it on their bids for the plates?

"A. If there was no bid between?

"Q. Yes, if there was no bid between, but as a matter of fact there was a bid between.

"A. Yes, and there was a bid lower than the total of those two bids." (Record, p. 271.)

On cross-examination this witness testifies:

"Q. I did not quite understand what you said about this combination bidding between McMullen and Hoffman, or the San Francisco Bridge Company and Hoffman. How was it that they were going to combine their bids—on a general average?

"A. The Hoffman and Bates bid on manufacturing and laying was $465,667.00, and the San Francisco Bridge Company's bid on the plates was $348,781.00, making a total for the two of $814,448.00. NOW, IT WAS UNDERSTOOD IF THAT WAS THE LOWEST (record, p. 275) TOTAL THAT THEN THEY WERE TO MAKE AN EFFORT TO HAVE HOFFMAN AND BATES' BID ON THE DELIVERY OF THE PLATES ACCEPTED, AND HAVE THE SAN FRANCISCO BRIDGE COMPANY'S BID ON THE DELIVERY OF THE PLATES WITHDRAWN, which would

raise the total they were to receive on the delivery of the plates about $10,000. The exact total would be $824,945.80." (Record, p. 276.)

It is true that P. L. Willis, Hoffman's attorney, gives some testimony as to declarations which Hoffman had made to him on these points, but if these declarations are in any sense competent evidence they add nothing to Bush's statements.

We ask where is there any suggestion of fraud in this proposal? It signifies only that the parties, so far from intending to defraud the city of Portland, simply proposed to represent that the aggregate of their two bids was lower than any other aggregate upon these branches of the work, and that consequently both contracts should be awarded them. It was a proposition directly in the interest of the city, however prejudicial it might have been to other bidders, and it was to be presented openly to the city in this light. It would be hard to conceive of a more strained effort to torture a fair transaction into a fraudulent one. If any such thing was contemplated without the city's approval, it would simply have been, as McMullen characterizes it, "idiotic."

And even if this project were capable of the coloring which counsel for respondent seek to give it, how can a scheme which never materialized, never came into existence, never had any application to the matters in suit, affect McMullen's right of recovery? The parties did not suc-

ceed on the other bid and consequently could not make any such combination.

McMullen testifies in regard to this matter in response to the examination of respondent's counsel (record, pp. 220–1):

"Q. Now, was it not agreed and understood between yourself and Mr. Hoffman that if when these bids should be opened, Hoffman & Bates should get the contract for manufacturing and laying the pipe, and the bid of the San Francisco Bridge Company should be the next lowest on the other items, and the bid of Hoffman & Bates should be the next lowest to them, or above them —that in that case, the San Francisco Bridge Company would refuse to accept the award to them, if it were made to them, and all effort should be made that could be made *to induce the water committee to take the contract at the rate named in the bid of Hoffman & Bates?*

"A. That is absolutely untrue; it is more than that, it is idiotic; these bids were accompanied by a check, I think, to the amount of $25,000, to carry out the contract, and we would have to sacrifice that check to get the price of about—according to the items in the question—$14,000.

"Q. I simply ask the fact whether there was not such arrangement as that?

"A. No, sir, there was no such arrangement; I don't think that anybody ever told you that there was ever any such arrangement.

"Q. I don't think, Mr. McMullen, that there is any question of veracity between you and I; I am not arguing the question.

"A. There was no such arrangement."

With regard to the argument which has been made as to the defense based upon the bidding for the work involved in the pending controversy, we may say that the strongest presentation of the case which can be claimed by the respondent is that the action of the parties will preclude a recovery by McMullen upon either of the following hypotheses, viz:

1. If it was the purpose of Hoffman and McMullen to deceive the city of Portland to its detriment.

2. If that was the natural tendency of their action.

3. If that was the result of their action.

With regard to the first proposition, it is to be observed that there is no charge in the bill, nor is there a particle of evidence in the record, that Hoffman and McMullen ever conspired to mislead the water committee of the city of Portland in the matter of their bids for the work in suit.

We are aware that the court may infer an intention from the character of an act, a consideration which in this connection more appropriately falls under the second proposition stated above, but beyond this the record is absolutely as we state it. Bush testifies that Hoffman and McMullen did agree that each of them should bid in different amounts, *but that this was for the purpose of enabling them to effect the combinations discussed above.* He does not offer a suggestion that they ever had under consideration at any time or in any connection the matter of deceiving the water committee in regard to their bids on the manufacturing and laying of the steel pipe. It is argued that the tendency of McMullen's act in having submitted a higher bid than Hoffman for the same work was to lead the water committee to conclude that Hoffman's bid was a desirable one. This claim will be answered a little further along. We say now only that respondent's counsel cannot point out a word of evidence going to show that Hoffman and McMullen ever discussed any such result, or that it ever entered the head of either of them.

We beg to submit the testimony bearing upon this matter.

We do not wish the court to understand that we impugn Mr. Bush's veracity, but we do say that his testimony ought to be taken as the strongest presentation of respondent's case which can be made. He was an employee of Hoffman's,

and in this controversy he voluntarily crossed the continent from his Massachusetts home (record, p. 275) to give his testimony on that side of the case. He is at least a very friendly witness.

Before reciting this testimony we desire to attract the court's attention to a point which has led to a great deal of confusion in the case, and that is the difference between a "bid" and an "estimate." It has been contended by respondent's counsel that McMullen came to Portland with the intention of bidding against Hoffman on the work in suit, and very much has been said about certain *figures* which McMullen brought with him. It is perfectly clear that these figures represented the engineers' estimates of the cost of doing the work, and were in no sense of the word a proposed bid, which of course included these cost estimates plus such sum as the contractor might see fit to add for prospective profit. We shall rely upon the showing already made that Hoffman and McMullen never contemplated opposing each other, or bidding otherwise than in their joint interest, and not go into that feature of the case again.

Bush gives the following testimony:

"Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland?

"A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return. (Record, p. 263.)

"Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

"A. Well, *Mr. McMullen came up with him*, and Mr. Hoffman informed me that he and Mr. McMullen were going to bid together for the work; MR. MCMULLEN HAD A GREAT MANY ESTIMATES AND FIGURES AND LETTERS REFERRING TO THE COST OF THE WORK, and I went all through those." (Record, p. 264.)

On cross-examination the witness testified:

"Q. You were representing Mr. Hoffman and assisting him in making estimates, were you not?

"A. Yes, sir.

"Q. Did you not make a great many estimates, or I will say several estimates during those days? (Record, p. 277.)

"A. Well, I made several estimates; yes, sir.

"Q. *And is it not a fact that you were making these several estimates because they had not agreed*

upon any bid when McMullen first arrived here—neither one of them?

"A. *Yes, I think it was a fact that they had not agreed upon a bid.*

"Q. And these different estimates which you were making were in consequence of their want of agreement in regard to the amount of the bid to enable them to finally arrive at a bid which would be satisfactory, and would be submitted to the water committee?

"A. Yes, sir. (Record, p. 278.)

"Q. Now, I notice the first item to which you refer on the Catt estimate is $282,768.00, and on your estimate it is $324,000.00—that is, for manufacturing and laying of the pipe; how did you arrive at that change in figures—just made a guess, or by careful consideration of all elements which would enter into the cost of furnishing the material and doing the work?

"A. No, sir; we decided in the beginning THAT AS THREE ESTIMATES OF THE COST CORRESPONDED SO CLOSELY, THAT THAT SUM SETTLED THE QUESTION OF COST. After that it was simply a question of how much profit to add.

"Q. What estimates do you refer to? (Record, p. 283.)

"A. THE ESTIMATES MR. MCMULLEN BROUGHT FROM SAN FRANCISCO BY MR. WOOD, AND MR. CATT'S ESTIMATE, AND MINE. (Record, p. 284.)

"Q. I have a note here which is not quite clear what you (record, p. 287) said about Hoffman trying to get the bid increased; what bid was that, do you remember?

"A. I think that related to manufacturing and laying.

"Q. Whose bid, Hoffman's or McMullen's?

"A. Well, I think I referred to that when they were talking about Catt's estimate. My original bid was almost the same as his, within a few thousand dollars.

"Q. YOU MEAN ESTIMATE?

"A. YES, SIR, ESTIMATE." (Record, p. 288.)

On his further examination for respondent Bush testified:

"Q. In his testimony Mr. Mullen stated that when he came up from San Francisco he brought all the data he had relating to this pipe line business, and took it to Mr. Hoffman's office, and that Mr. Hoffman brought all that he had, and Mr. McMullen and Mr. Hoffman and Mr. Hoffman's engineer and Mr. Lockwood and Mr. Cooper set down together and discussed the matter, and out of the most of the data that they had, and the information they were getting constantly from the east, they finally formulated a bid that was put in; what was the fact about that?

"A. The fact is that when Mr. McMullen first came up here we compared all our estimates of the cost—

"Q. When you speak of "we," who do you mean?

"A. I mean Mr. Hoffman, Mr. McMullen and myself; and Mr. Lockwood was there some of the time, I think not at the first, and we finally settled on the fact *that the estimates of the cost must be correct.*

"Q. That is the cost of manufacturing and laying the pipe—what led you to that conclusion?

"A. Well, because the three estimates were practically the same; after that it became a question simply of deciding how much profit to put on the job, *and that subject was talked over back and forth principally between Mr. Hoffman and Mr. McMullen themselves.*" (Record, p. 329.)

On cross-examination he testified.

"Q. You say that you prepared [compared] all the estimates of cost which Mr. McMullen brought here, [with] what you had made, and from that you determined that the three estimates, being approximately the same, must be nearly correct?

"A. Yes, sir.

"Q. IS IT NOT A FACT THAT THAT IS THE ONLY USE THAT WAS MADE OF THOSE ESTIMATES TO DETERMINE THE COST PRICE?

"A. WELL, I DON'T KNOW BUT WHAT IT WAS. (Record, p. 330.)

"Q. THE CALCULATION OF THE ENGINEERS HAD NOTHING TO DO WITH THE DETERMINATION OF McMULLEN AND HOFFMAN AS TO WHAT AMOUNT THEY WOULD ADD TO THE ENGINEERS' ESTIMATE FOR PROFIT, HAD IT?

"A. NO, SIR.

"Q. McMULLEN AND HOFFMAN DETERMINED THAT THEMSELVES, IRRESPECTIVE OF ANYTHING THE ENGINEERS DID?

"A. YES, SIR." (Record, p. 331.)

In this connection Wood, McMullen's San Francisco engineer, gives the following testimony in his deposition:

"Interrogatory 4. If you answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf or at whose instance, you performed whatever service you may have performed? State fully just what you did.

"Answer 4. On behalf and at the instance of John McMullen, president of the San Francisco Bridge Co., and Lee Hoffman, I made several estimates and inquiries concerning the cost of the different items on the Bull Run waterworks contract pri-

or to the letting of said contract as above mentioned. * * * No bid made by me at any time was intended to be final for the use of said John McMullen and Lee Hoffman, as it was definitely understood that a similar preliminary estimate was to be independently made by George W. Catt, of New York, which was to contain the experience of Clemens Herschel, chief engineer of the Jersey City pipe line; and also a third estimate was to be independently made by the engineer of Hoffman and Bates, of Portland, Oregon. (Record, p. 146.) * * * I was informed before making this Exhibit U2 and V2 that the items of the three estimates, including this, were to be reviewed by our Seattle engineer, Mr. J. B. C. Lockwood, and by the engineer of Hoffman and Bates in Portland, and by the principals, John McMullen and Lee Hoffman, and each individual item checked one with the other, and that which seemed most reliable in the light of such comparison to be used in the final estimate and bid, and I understood, and still understand, that these comparisons were so made, and that such final estimate there resulted. (Record, p. 147.)

"Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for a bid on any portion of the work, or as an estimate of the cost price of doing the work.

"Answer 6. It was in no sense designed as a bid on the work, but, as explained, for the purpose of drawing checks to be used in the bid. It was an estimate of the cost price of doing the work in my opinion, subject to being checked by two other estimates, as explained.

"Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

"Answer 8. No bid was prepared or agreed upon to be submitted at the letting, or for any other purpose than for preliminary comparison and the drawing of proper certified checks, as above explained." (Record, p. 148.)

Catt testifies in his deposition:

"Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

"To the seventh interrogatory he saith: The estimate headed 'Portland Water Works Esti-

mate' was designed to cover the items named therein, and was my report of the estimated cost of the work, based on the information I then had, and was subject to correction in future reports; and it was thus corrected. The report, of which this is a partial and somewhat incorrect extract, was made February 21st, 1893, and was the first general report made. There were some ten or twelve reports made after it. They were, all of them intended to aid McMullen and Hoffman in making up a bid for the 'Bull Run' pipe line works, and embodied my estimate of the cost. It was not intended as a bid, the letter which accompanied it called it an estimate. The several parts of it were called 'bids' because that was the designation given them in the specifications. They were, however, in no sense bids or tenders for the work, nor were they intended as such. Throughout my reports such expressions as these frequently occurred:

"'My estimate item No. is only approximate, you best check this carefully;' or, 'This is my estimate, you may think differently.'

"The actual amount of this bid to be put in was to be determined at Portland, Oregon, by the representatives of the two concerns. My estimates were to aid these representatives in arriving at a proper and safe bid to make for the work." (Record, p. 156.)

It is as plain as anything could be made from this testimony that McMullen did not come to

Portland with a bid, or with anything beyond what is techinally known as an "estimate of cost."

The testimony of Bush heretofore recited (*supra*, pp. 57-8) and of Wakefield (pp. 60-1) conclusively shows that it was McMullen who finally fixed the Hoffman bid, and completely negatives the idea that he was taking any interest in any other bid.

Bush gives this further testimony in regard to McMullen's bid on the work in suit (record, p. 300):

"Q. If Mr. Lockwood did any figuring on this matter at all, to what part of the work was his figuring directed?

"A. I do not think Mr. Lockwood did any figuring to amount to anything. He simply filled out Mr. McMullen's bid.

"Q. Now where was he when he filled out that bid?

"A. In Mr. Hoffman's office.

"Q. How were the figures on that bid arranged and by whom?

"A. WELL, THE FIGURES IN MR. MCMULLEN'S BID FOR MANUFACTURING AND LAYING WERE NOT PARTICULARLY AGREED UPON BY ANYBODY. IT WAS AGREED THAT IT SHOULD BE A HIGH BID, AND IT WAS SIMPLY FILLED IN TO MAKE IT HIGH. IT

WAS NOT AGREED UPON TO BE ANY PARTICULAR AMOUNT."

It is certainly a most extraordinary thing if Hoffman and McMullen were scheming and conspiring to deceive the water committee by means of McMullen's bid, that they should have been so indifferent to its amount!

Now in regard to his bid on the work in suit we submit that McMullen offers a perfectly rational explanation of his action, and there is not a syllable in the record to the contrary. He testifies as follows on cross examination:

"Q. Did you prepare any bid for this work, or substantially the same work, to be submitted to that commission?

"A. No, I did not.

"Q. Did you do any preliminary figuring with reference to the bid upon that same work before you consulted with Mr. Hoffman?

"A. Oh, yes. (Record, p. 176.)

"Q. Did you not, as a matter fact, Mr. McMullen, come prepared, or prepared while you were here, a set of figures to be bid for substantially the same work, which was a number of dollars less than the amount of the bid agreed upon between yourself and Mr. Hoffman to be bid?

"A. I never did.

"Q. Did you ever have any such a bid as that that you exhibited to Mr. Hoffman?

"A. Well, now, judge, I think you are falling into an error in confounding a bid with an estimate.

"Mr. COX.—Don't be argumentative; simply answer the questions.

"The WITNESS.—Repeat the question.

"(The question is read to the witness.)

"A. In the first part of the question it is a set of figures, in the second question it is a bid. Now, I cannot answer the question intelligently under the circumstances. There is a great deal of difference between a set of figures and a bid. If you mean a bid, then I will answer you; if you mean a set of figures, it is something different.

"Q. I will ask you for a set figures intended for a bid.

"A. No, sir; never did; never had any set of figures that were in any way intended for a bid except the set of figures that was put in by Mr. Hoffman, under the name of Hoffman & Bates, in which I had an interest.

"Q. The set of figures or bid which I have referred to were they not exhibited to Mr. Hoffman, and did you not indicate or say to Mr. Hoffman that you intended to file them with the committee as a bid, and did he not object unless the

amount was raised above the statement as he had prepared it?

"A. I never did, and he never did; we conferred together about the amount that we should bid, and when we arrived at a conclusion the bid was put in, and that was the only time that our joint judgment agreed as to what the value of this work was.

"Q. Do you swear, Mr. McMullen, that you did not come here with a set of figures intending to bid upon this work, or if not did you not prepare a set of figures while here, intending to bid upon this work—which you exhibited to Mr. Hoffman, and that Mr. Hoffman objected to your making a bid without increasing the amount charged for this work? (Record, p. 177.)

"A. I did not.

"Q. You swear that you did not?

"A. I swear that I did not. (Record, p. 178.)

"Q. Did not Mr. Hoffman have an estimate prepared by himself as a basis for a bid for the work of which we are speaking, which you required to be reduced, assuring Mr. Hoffman that the work could not be done at those figures, and was not Mr. Hoffman's bid reduced at your suggestion?

"A. No, his bid was not reduced; he never made but one bid.

"Q. His estimate, then?

"A. Well, the facts are these: That after I got to Portland, I think, judge, I can help you along in this, if you want it the way I understand it.

"Q. Answer my question; if I don't get it right, you can correct me, but I want to get it just as it is.

"A. The facts are these, that there was no definite, final estimate arrived at except the one that was put in the bid, but the other estimates were made jointly, and when I came to Portland, I brought all the data and information that I had gathered, and went into Mr. Hoffman's office, and laid them down on his table, and he at the same time, and in the same place, produced all the data and information that he had gathered, and he had his engineer there, and Mr. Lockwood, an engineer of the San Francisco Bridge Co., and Mr Hugh L. Cooper, another engineer in the employ of the San Francisco Bridge Co.,were all together in the same room, and we had all these papers, and we took the different items in the cost up seriatim, and we argued them whether they were high or whether they were low, and every day we were getting telegrams all [and] letters that caused us to modify, sometimes to increase and sometimes to diminish, our idea of the cost of each separate part of this work; generally, I would state, that I was low, that is, I insisted that if we were going to bid at all for (record, p. 179) this work, we must put in a bold, hard bid; Mr. Hoffman was

somewhat inclined to be conservative and the result of our joint judgment as to the lowest price that we should put in was agreed upon about 11 o'clock that night in Mr. Hoffman's office, in the presence of his engineer and our two engineers; on the next day it was written out by Mr. Hoffman's engineer on a blank form, and the bid put in by him. Now, that is substantially the way the bid was evolved. (Record, p. 180.)

"Q. When you and Mr. Hoffman were figuring upon the bid that you finally put in to the water committee, you also figured upon the bid that you were to submit in the name of the San Francisco Bridge Company, did you not?

"A. We did not.

"Q. Did not?

"A. No.

"Q. You had no figuring with him or understanding with him about the bid that the San Francisco Bridge Company was to put in, did you?

"A. I did not, none at all; the only bid that we agreed to was the bid that went in in Mr. Hoffman's name.

"Q. He did not know that you were going to put a bid in for the San Francisco Bridge Company, did he?

"A. Oh, yes.

"Q. How did he find that out?

"A. Well, I think I told him so; I told him that I did not want to come up here and go home again without putting in a bid, and, for appearance sake, I wanted to put in a bid.

"Q. Did you show him the bid?

"A. I don't think so.

"Q. Do you swear that you did not?

"A. Yes, I swear that I did not.

"Q. You swear that you did not?

"A. Yes.

"Q. Mr. McMullen, is it not a fact that you arranged that bid with Mr. Hoffman purposely, so that it should overbid the amount of the other bid that you and he had?

"A. The fact is—

"Q. Just answer that question.

"A. No, sir.

"Mr. COX.—You can now make what explanation you want to. (Record, p. 218.)

"The WITNESS.—The explanation is this: There was only one bid agreed upon between Mr. Hoffman and myself, and that was the bid in which we both were interested in, and which was put in in the name of Hoffman & Bates; the other bid referred to by Mr. Mallory is the bid put in by the San Francisco Bridge Company, some forty or fifty thousand dollars higher than the bid that we proposed to take the job on, and was put in simply to keep the San Francisco

Bridge Company's name before the public, and for the further purpose that all the contractors knew that the San Francisco Bridge Company was here, and would think it strange if we did not put in a bid. Mr. Hoffman did not care anything about the bid, nor did the San Francisco Bridge Company care anything about it, but it was put in as a pure matter of form. We knew it would be too high, and that is absolutely the truth about that bid as I know it to be.

"Q. Is it not a fact that you and Mr. Hoffman agreed together to make the aggregate of the bid of the San Francisco Bridge Company more than the aggregate of the bid of Hoffman & Bates?

"A. No, sir, Mr. Hoffman had nothing to do with the San Francisco Bridge Company's bid, and it was put in by the San Francisco Bridge Company for the purpose as I have stated, and Mr. Hoffman cared, or knew, or had nothing to say, about it. (Record, p. 219.)

"Q. Was not the understanding between you and Mr. Hoffman, that while your bid for manufacturing and laying pipe was $514,664.00 and the bid of Hoffman & Bates was $456,656.00, you made the bid of the San Francisco Bridge Company on all of the other work less than the amount named in the bid of Hoffman & Bates?

"A. The low bid of either Hoffman or the San Francisco Bridge Company was the joint bid

in all cases, and other bids that may have been put in by either party, as I said before, we had no interest in; it was simply put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and we had no interest in it, and we did not care anything about how much it was, and by 'we' I mean Mr. Hoffman and myself. The high bid was put in simply to allow the firm putting it in to be represented at the bidding." (Record, p. 220.)

It remains to notice the charge against McMullen of a purpose to influence the clerk of the water committee as shown in a certain letter written by him to Hoffman, which charge is very artfully presented in the answer so as to appear to embody a force which it does not at all possess. This seems to have constituted the principal reliance of counsel for respondent, and the circuit court of appeals made it the test by which they judged of McMullen's right to recover. It has no legitimate influence upon the true issues between the parties and its sole office is to involve the case in a bad atmosphere and thereby obscure the real points before the court. We do not feel called upon to say more of this matter than this:—

1. The letter was written August 4, 1893, *just five months after the transactions involved in*

this suit had been concluded, and it did not enter in any degree into the joint action of Hoffman and McMullen, or have anything whatever to do with their action. (See record, p. 556.)

2. It was in regard to a distinct and separate branch of the water works system. The answer does not charge that both parties were trying to get this contract, but simply that *McMullen* was trying to get it.

3. The charge in the answer, upon the strength of which the letter was introduced before the examiner, was stricken out by the trial court, as has been shown.

4. The letter was objected to by McMullen's counsel when offered in evidence. (Record, p. 204.)

We think the testimony recited above completely establishes the first of our propositions, viz.: That it was not the intention of Hoffman and McMullen to endeavor to deceive the water committe in the matter of their bids.

Therefore the respondent has failed to make out any case of fraud in fact against McMullen and has failed to substantiate even the loose and ambiguous charges of the answer, and the only question before the court is as to whether the acts pleaded in defense are constructively fraudulent, or may be deemed sufficient to raise a presumption of fraud.

The action of McMullen in submitting a high bid for the work in suit had no rational tendency to deceive the water committee.

Before reviewing the evidence bearing upon this feature of the case, it may not be out of place to make some reference to the authorities which enunciate the principle by which the act is to be judged.

The primary question involved is of course that of public policy. Of this Best, C. J. said in *Richardson vs. Mellish*, 2 Bing., 229, on page 242:

"We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of *Westminster Hall* (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will pre-

vent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover."

Burrough, J., said in the same case on page 252:

"I am of opinion, that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon *public policy;—it is a very unruly horse*, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

We have stated the triple aspect of McMullen's action above quite as strongly as we think respondent's counsel would have stated it on her behalf, and, we think, more in her favor than the authorities justify.

In *Wicker vs. Hoppock*, 6 Wall., 94, the parties had agreed that if Hoppock would take a judgment against Chapin & Co. and expose their property for sale, Wicker would attend the sale and bid the amount of the judgment. Hoppock complied with his promise, but Wicker did not attend the sale nor bid. Hoppock sued for breach of contract and recovered, and Wicker brought the action up on writ of error. The judgment was affirmed, the court saying (p. 97):

"It is said that the agreement between the parties 'was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy.'

"The contract was, that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments.

"The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained."

The only case which we have been able to discover which involves facts similar to those found here is *People vs. Stephens*, 71 N. Y., 527, and while there are some additional considerations in that case, what is recited below is certainly to the point in the pending controversy. Public work was let to bids, and a number of sham bids, higher than the one on which the contract was awarded, were submitted. The court say (p. 547):

"The contract was also assailed as fraudulent by reason of the acts of the parties in submitting, or causing to be submitted, to the contracting board sham and false proposals holding them out as genuine. In this particular instance, the simulated offers were at higher prices than those named in the proposal of Leahy, and the latter was in fact the lowest bidder. *Whether the other bids affected the judgment of the contracting board, and influenced its decision in accepting the proposal, on the ground that it was not excessive in price or disadvantageous to the state, there is no evidence.*" (Italics ours.)

And again (p. 548): "Evidence was given on the trial tending to show that the contract price was excessive; but there was no evidence that the contracting board acted corruptly or *mala fide*, or that they had not full knowledge of every fact bearing upon the question, as well as of the character and value of the services to be performed, and the risks to be encountered by the contractor."

In reality this method of letting contracts is but a species of auction sale of a reverse order, in which attempts to mislead in regard to the question of values are quite analogous to the efforts of "puffers" employed by vendors. In these cases actual deception is made the test of avoidance.

Thus in *Veazie vs. Williams*, 8 How., 134, where an auction sale of property was held and

real bidders ran the property up to $20,000, and thereupon the auctioneer by fictitious bids ran it up to $40,000, at which figure it was taken by a purchaser who afterwards sought a release from his purchase on the ground of fraud, this court said (p. 157) the test to be applied was, "Was the purchaser deceived?"

This case was heard before Mr. Justice Story on the circuit, and in reviewing the authorities bearing on the question he says (3 Story, 611, 620–2):

"On the other hand, Lord Loughborough, in *Conolly vs. Parsons* (3 Ves. Jr. 625, note), held the opposite doctrine; at least, as applicable to cases where there was no absolute, intentional fraud. He said; 'I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if A. a skillful man, B. a cautious man, and C. a wealthy man, are in competition. But where it is publicly known, that persons are so employed to bid, it would be very foolish in anyone to let himself be so influenced.' He afterwards added; 'It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price the seller thinks to

be a reasonable price.' Lord Alvanley, in *Bramley vs. Alt*, (3 Ves. Jr. 620), seems to have acted upon the same doctrine, where, although bidders are employed by the seller, yet there is a real bidder immediately before the purchaser.

"It appears to me, that there is room for some distinctions upon this subject, which, if they do not fully reconcile the cases, are, at all events, well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, there the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers, there, if the last bid before the purchaser's bid be a real bid, and no intentional deceit has been practiced by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid, and for the very reason stated by Lord Loughborough and Lord Alvanley."

The principle laid down in this last case was applied by Chancellor Zabriskie in *National Bank of the Metropolis vs. Sprague*, 20 N. J. Eq., 159.

In this case the bids ranged as follows (record, p. 242):

Risdon Iron & Locomotive Works, $600,737.

Bullen Bridge Company, $533,507.

Oscar Huber, $521,775.40.

San Francisco Bridge Company, $514,664.

Wolff, Buehner & Zwicker, $495,682.

Perry Hinkle and Robert Wakefield, $481,040.

E. W. Jones and O. W. Wagner, $477,552.

Hoffman & Bates, $465,667.

Just in this connection we give the testimony of Col. Isaac W. Smith, the engineer of the water committee. He says (record, p. 242):

"Q. These bids were all before the committee and taken under consideration at the time the award to Hoffman & Bates was made, were they not?

"A. They were all opened on the same day at the same time.

"Q. And all given consideration?

"A. All given consideration, yes.

"Q. How did the estimate which you had made on the work of manufacturing and laying the steel pipe compare with the bid put in by the San Francisco Bridge Co. for that work?

"A. I think that my estimate was larger than the estimate of the San Francisco Bridge Co. I estimated a larger price for the iron.

"Q. Your aggregate estimate was larger than the bid which the San Francisco Bridge Company put in?

"A. Yes, sir."

Now, in cases where it is held that by-bidding may be ground of relieving a purchaser from an exorbitant bid, this relief is based on considerations of public policy, for while the purchaser may be the immediate victim of the fraud it is in the interest of the public that such practices be stopped. Therefore, if in an ordinary auction sale where the purchaser runs the hazard of being defrauded, he must show that his bid rested on a fictitious one, and that he relied upon and was misled by the fictitious bid, why is not the converse of the proposition true in what are denominated "Dutch auctions" where the vendor runs the risk of deception?

Apart from these decisions we ask, could the action of McMullen in submitting his higher bid have had any *rational* tendency to mislead the water committee? It seems to us clearly that this is the test to be applied, and not whether it had a speculative or imaginary tendency.

Col Smith testifies (record, pp. 241–2):

"Q. Is it not a fact, Colonel, that before these bids were opened or considered that you had made full estimates in regard to all of the work for

which bids were submitted, so as to determine the reasonable cost of doing the same?

"A. I did make that estimate.

"Q. It is a fact, is it not, that this estimate had been submitted to the committee, and was before the committee at the time these bids were opened?

"A. My estimates had been submitted to the committee; I do not know whether they were before the committee at that time.

"Q. How long prior to this time had they been submitted?

"A. Well, I suppose my last estimate was probably about three months before the letting of the bids.

"Q. Did you not advise the committee from time to time as its engineer in regard to the cost of doing this work, prior to the time these bids were opened and the contracts let?

"A. How do you mean, during the progress of the work or prior?

"Q. Prior to the time the bids were opened.

"A. Yes; I made a great many estimates from 1886 to 1893, and while the work was going on I made a great many estimates for them; I do not remember the dates. I estimated the cost and made a full report.

"Q. That had all been submitted to the committee before the bids were opened.

"A. It had all been submitted to the committee before the bids were opened.

"Q. Did not the committee in the matter of those bids reserve the right to reject any and all bids?

"A. They did.

"Q. And without the necessity of assigning any reason therefor?

"A. That is the fact; they reserved the right."

Now how can it be said when the water committee were acting under the advice of their own skilled expert, whose estimates were all before them, and whose estimate on the work in suit exceeded the amount of McMullen's bid, that they could reasonably have been misled by McMullen's bid? This will appear more clearly below in connection with our consideration of the question as to whether or not they were in fact misled. The language of Lord Loughborough quoted above applies with great force to such a condition, wherein he says: "I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the action of others." When two parties are set in array against each other, when their interests are directly antagonistic, when each knows that any advantage gained by

one is at the expense of the other, we do not believe our courts will consider that either side is so guileless as to rely upon or be influenced by anything the other does.

We challenge the soundness of the "tendency" test. If actual fraud is found it should be given full force; if an actual result has been attained by designedly fraudulent means prejudicial to the other party, the victim of the fraud, in a proper case, should be relieved from the situation. But in a case where actual fraud is absent and no result has been accomplished, the mere tendency of an innocent act to mislead, or probability that it might mislead, is too visionary and speculative a consideration upon which to determine the substantive rights of individuals. Actual fraud is a certain ground for judicial action, and so is an actual result attained by fraudulent means; but to say that a mere *tendency* of an act to deceive, where nothing was designed and nothing accomplished, is to measure the rights of parties by a standard uncertain, fluctuating and altogether foreign to the principles upon which courts act.

The water committee of the City of Portland was in no degree influenced by McMullen's bid, and did not take any different action in connection with it than would have been taken if it had never been submitted.

The testimony recited above has shown that the engineer made his own estimates upon the

work which exceeded the amount of McMullen's bid; that the water committee reserved the right to reject all bids; that eight bids in all were submitted, three higher and four lower than McMullen's.

Mr. Henry Failing, chairman of the water committee, was called by respondent to prove her case and he gave the following testimony:

"Q. Had you any knowledge or information at the time these bids were opened, or prior to that time, that Mr. Hoffman and Mr. McMullen were united in this purpose to bid on this work?

"A. No, sir.

"Q. Had no knowledge on that subject?

"A. I had not. I never saw Mr. McMullen to know him until today, although I think I have seen his face.

"Q. The testimony in this case shows that there was before the committee a bid of Hoffman and Bates for manufacturing and laying the pipe of some $465,000.00, and something over that, and another bid submitted by the San Francisco Bridge Company for $514,000.00 and some odd dollars, and so there was also evidence that there were some five or six other bids. I will ask you if at that time you had any knowledge that the

bid of the San Francisco Bridge Company, signed by McMullen was a mere sham simply put in for the sake of making a show?

"A. No, sir.

"Q. Now, was that bid with the others treated as being a bid in good faith? (Record, p. 387.)

"A. It was treated by the committee in the same way. *The bids were referred to the chief engineer for compilation.* They were all treated alike.

"Q. There was no knowledge on the part of yourself that there was anything about this bid any different from the other bids?

"A. No, sir." (Record, p. 388.)

On cross-examination the witness testified:

"Q. In the matter of taking these bids by the water committee, Mr. Failing, the committee was advised by its chief engineer, was it not, as to the probable cost of doing this work?

"A. Yes. We had got an estimate.

"Q. You had an engineer who you felt satisfied was competent to advise you in regard to the matter?

"A. Yes, sir.

"Q. The work of making these cost estimates was referred to him and he made them, did he not?

"A. Yes, sir.

"Q. What did the committee do in regard to these bids when they were submitted to the committee and opened?

"A. Referred them to the engineer.

"Q. Now, is not that all the action the committee took on the bids when they were first opened?

"A. *That is my recollection.* I think now that they authorized the contract to be entered into with the lowest bidder on the certificate of the engineer. I am not sure about that Mr. Cox; that was the usual method.

"Q. It is a fact, is it not, that the committee had reserved the right to reject any and all bids without assigning cause?

"A. Yes, sir. (Record, p. 393.)

"Q. Now, is it not a fact that the engineer took these bids when they were referred to him as you have testified, and that he went over the ground and reported to the committee the party who was the lowest bidder on each class of work for which proposals had been submitted, and the amount of his bid?

(Counsel for defendant objects to the answers as immaterial and not cross-examination, and objects to all the questions that have been propounded to the witness on that subject upon the same ground.)

"A. I think that is the fact. (Record, p. 395.)

"Q. Now, in making your annotation in regard to the schedule of bids you must have made it from something that satisfied your mind?

"A. Yes.

"Q. *And it needed no computation to determine whether the lowest bid was a good bid?*

"A. *No.*

"Q. *You looked to the advice of your engineer, did you not, to determine whether the lowest bid was a proper one?*

"A. *That is, a reasonable bid?*

"Q. *No, whether it was a good bid for the work according to the cost price of the work.*

"A. *Yes.*

"Q. And you simply took these figures down yourself to determine whether or not the engineer's report agreed with your own notation of what had taken place?

"A. Yes, sir.

"Q. You did not, Mr. Failing, for the purpose of determing whether the bid submitted in in the name of Hoffman and Bates was a reasonable bid as to the cost of doing this work, compare it with the bids of the San Francisco Bridge Company or with other bids, did you?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. As to whether it was a reasonable cos or not?

"Q. Yes.

(Same objection.)

"A. I do not recollect just who the bidders were, but whoever they were they were taken down and I examined the gross sum of the work, and saw it and how it stood relatively, and which was the lowest.

"Q. You have not quite answered my question.

(The question beginning, 'You did not, Mr. Failing, for the purpose of determining, etc.,' was read to the witness by the examiner.)

"A. *I do not think I did.*

"Q. Now, I will ask you, Mr. Failing, if you were in any degree influenced as to the propriety of accepting the bid of (record, p. 396) Hoffman & Bates by the fact of the bid that was put in by the San Francisco Bridge Company, or in any other name, for the manufacturing and laying of this steel pipe?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

"A. No, I DO NOT THINK IT HAD THE SLIGHTEST INFLUENCE WITH ME. I did not know who the San Francisco Bridge Company were.

"Q. Then the fact is that you did not, so far as you were concerned, undertake to determine

on the merits anything about any of these bids when they were first submitted and opened by the water committee?

"A. No.

"Q. The bids were opened, listed and referred to the engineer?

"A. Yes.

"Q. And the engineer made up his report as to the lowest bidder, and upon the submission of the engineer's report the award was made?

(These questions are all objected to by counsel for defendant as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. *I think that is correct.*

"Q. Do you remember now, Mr. Failing, what the bid of the San Francisco Bridge Company, or of any other bidder except Hoffman and Bates, was on the manufacturing and laying of steel pipe?

"A. No, sir.

"Q. Did it make any impression upon your mind whatever?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. No, I cannot remember.

"Q. I wish you would state who were the members of the water committee on the first of March, 1893, if you can do so.

"A. I do not know whether I can repeat all their names, but I can a part of them.

"Q. Give as many as you can easily call to mind.

"A. Mr. C. H. Lewis, C. A. Dolph, J. Loewenberg, H. W. Corbett, R. B. Knapp, Mr. C. H. Hill —I think he was a member then—and C. H. Rafferty.

"Q. Mr. S. G. Reed was one, was he not?

"A. Yes, sir.

"Q. Now, I will ask you, Mr. Failing, if these gentlemen were not all gentlemen of large and varied business experience? (Record, p. 397.)

(Question objected to as immaterial and not cross-examination.)

"A. I think so—as a class they were.

"Q. You understood and they understood, so far as you know, did you not, from what transpired between them and yourself, that the committee was protecting itself on this matter of bidding, and was looking out for its interest, and expected the contractors to look out for their interests?

(Question objected to by counsel for defendant on the ground that it is immaterial, incompetent and irrelevant, and not cross-examination.)

"A. The committee was trying to protect the interests of the city in every respect.

"Q. And you expected the people who were submitting these bids to take care of themselves?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. Yes, sir." (Record, p. 398.).

McMullen's Exhibit 26 (record, pp. 500–1) shows the action of the water committee on the bids, as entered on its minutes:

"An adjourned meeting of the water committee was held at the office of Ladd & Tilton in Portland on Wednesday, March 1, 1893, at 3 P. M.

"Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Rafferty and Richardson—11.

"On motion the reading of the minutes of the last meeting was dispensed with.

"On motion of Mr. Corbett the bidders were invited to enter the room; about 40 were present.

"The clerk presented a tin box and stated: 'That it contained 31 envelopes endorsed 'proposals,' all of which (except one which came by mail) had been presented by the bidders in person just before 12 o'clock noon this date, the limit of time fixed by the advertisement. As fast as the bids were handed in they were placed in the box and the latter sealed up at noon in the pres-

ence of the bidders. At 2:20 P. M. two additional envelopes endorsed 'proposals' were received with the understanding that as they were late the committee would decide whether they should be accepted.'

"On motion it was voted that these bids should be received.

"The box was then opened and all the proposals were read in detail by the chairman.

"On motion of Mr. Dolph, seconded by Mr. Corbett, the proposals were all referred to the engineer with instructions to prepare a tabulated statement of them and return all to the committee at 3 P. M. on March 2.

"Adjourned to meet at that time.

"[Signed.] HENRY FAILING, Chairman.

"Attest: Frank T. Dodge, Clerk.

"Pursuant to adjournment a meeting of the water committee was held at the office of Ladd & Tilton in Portland on Thursday, March 2, 1893, at 3 P. M.

"Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Rafferty, Richardson and Smith—12.

"On motion the reading of the minutes of the last two meetings were dispensed with.

"The tabulated statement of all the proposals for the different works for the water supply from

Bull Run, which the committee at its last meeting directed the engineer to prepare, was presented and read. * * * * * * *

"Mr. Corbett moved, with the second of Mr. Dolph, that contracts be awarded to the following named parties, certified by the engineer as the lowest bidders:

"J. M. Leavens, Portland, Or., head works	$ 7,930.00
"Pacific Bridge Co., Portland, Or., bridges	30,000.00
"Risdon Iron & Locomotive Works, San Francisco, steel plates for conduit head works to Mt. Tabor	340,971.60
"Hoffman & Bates, Portland, Or., manufacture and laying ditto	465,722.00
"Oregon Iron & Steel Co., Portland, Or., cast-iron conduit from Mt. Tabor to City Park	255,310.00
Total	$1,099,933.60"

There is no semblance of a suggestion that the water committee, or its engineer, were influenced by any bid cast with regard to their action, or that anything was done further than the mere ministerial act of making a computation, and the lowest bidder took the work under the prescribed conditions of the letting.

It goes without saying that McMullen's action in regard to the reduction of the Hoffman bid, which is made one of the grounds of defense, resulted in a direct benefit to the city of Portland. At his instance this bid was reduced $13,500, and thereby the city saved $11,885, for the next lowest bid, which would otherwise have taken the work, was that much higher than the Hoffman bid.

The partnership business of Hoffman and McMullen embraced work outside of the contract of the city of Portland with Hoffman, and also numerous transactions wholly independent of said contract, the profits of which were included in the decree of the circuit court in the case at bar.

The instrument signed by Hoffman and McMullen on March 6, 1893, which served as their articles of partnership, provided—after stating, in substance, that they had formed a partnership for the purpose of doing the work called for by the contract awarded by the water committee of the city of Portland to Hoffman & Bates, which was about to be formally entered into—as follows:

"It is further hereby agreed that if either of the parties hereto shall get a contract for doing, or do any other work let, or to be let, by said committe, for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be equally shared and borne by said parties."

During the time when the work of manufacturing and laying steel pipe was in progress, under said contract made by the city of Portland with Hoffman, other work *outside of that contract*, in connection with bringing Bull Run water to Portland, was done by Hoffman and McMullen, under the direction of the chief engineer of the water committee. That work amounted in the aggregate, at the prices charged for it by Hoffman and McMullen (record, p. 119), to something over $31,000, of which $14,496.74 had been allowed by the city of Portland, and $17,000 was in dispute, at the time McMullen's suit was commenced.

The profits made on the work done by Hoffman and McMullen, outside of the contract made by said city with Hoffman, do not appear from the stipulation contained in the record, but they are readily ascertainable, since all of the transactions respecting that work, are shown by the partnership books.

It also appears from the evidence in the case at bar, that while the work before mentioned was going on, Hoffman and McMullen kept a camp, store and boarding house, and maintained a hospital, and that from these and other miscellaneous sources, entirely outside of said contract for manufacturing and laying steel pipe, a profit was realized (record, p. 119) amounting to $15,339.76. Besides this, as found in the decree of the circuit court (record, p. 110) the parties had accumulated miscellaneous property which had

cost $7,857.36. All these matters were included in the decree of the trial court, and the decree of the circuit court of appeals took no note of them, but wiped the whole transaction out of existence.

Now, it is not alleged in the answer of Hoffman, nor has it ever been contended by counsel for the respondent, that there was anything unlawful or fraudulent, either in the work done by Hoffman and McMullen, outside of the contract made by the city of Portland with Hoffman, or in any of the tranactions from which said profits amounting to $15,339.76 were derived.

So that, if the illegality and fraud charged by Hoffman to have existed, in the agreement between McMullen and him to bid jointly, and in the means they employed to procure the award to Hoffman, of the contract for manufacturing and laying steel pipe, can be regarded as affording just grounds for depriving McMullen of his share of the profits realized in the partnership business carried on for the purpose of doing that work, those charges cannot furnish any reason whatever, for holding that McMullen is not entitled to recover his share of the profits made by the partnership, on work outside of that contract, and in transactions connected with the camp, store, boarding house and hospital before mentioned, all of which were entirely independent of the transactions arising out of the performance of the work called for by said contract made by the city of Portland with Hoffman & Bates.

With regard to the second defense urged by respondent, viz., that Hoffman dissolved the partnership between himself and McMullen on September 20, 1893, we submit that the ground upon which he professed to act gave him no right to effect any such dissolution and that none was accomplished in fact.

Hoffman's attempt at a dissolution of the co-partnership was of course an admission that one existed, that after the agreement to become partners had been entered into he and McMullen had launched the partnership and entered into the partnership relation. We will inquire first whether he had any ground for terminating this relation, and then, if any ground existed, whether the means to which he resorted were, or could have been effective.

It is charged in the answer as ground for this alleged dissolution (record, p. 35):

1. That Hoffman was required to give a bond with sureties to the city of Portland for the performance of his contract in the sum of $140,000; that he had requested McMullen to furnish part of the sureties, but McMullen had refused to furnish any of them, or to aid Hoffman in securing them.

2. That large advances of money were required in order to launch the work; that Hoffman was without the means of furnishing it; that from time to time up to September 16, 1893, he made

demands upon McMullen for half the requisite amount, but that McMullen "positively declined and refused to furnish any money whatever," claiming that he had none to put into business.

3. Generally, that after the parties had entered into the contract of March 6, McMullen "left the state of Oregon, and thereafter neglected, failed and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland."

4. In conclusion: "That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of copartnership the said defendant, on or about the sixteenth of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said complainant thereafter assented to said dissolution, and that thereby the said supposed copartnership was dissolved and terminated."

We do not deem it necessary to produce at length McMullen's testimony found on pages 164, 170, 181, 193 of the record as to his assistance in the prosecution of the work after March 6, nor to do more than refer to McMullen's exhibits 22, 23, 24 and 25, and respondent's exhibits E2 to R2, inclusive, to show that the parties were operating together; but Bush, respondent's witness, called in part to show that McMullen did nothing, testifies:

"Q. Were you about the place and upon the work nearly all the time from the time that you began in June until the end of the work?

"A. Yes, sir, nearly all the time.

"Q. Do you know what Mr. McMullen did about the work?

"A. Well, he came out there two or three times to see us.

"Q. How many times do you think he was out there—do you remember of his being there?

"A. I remember not more than three times.

"Q. When was that, do you know?

"A. I think he was out there twice in 1893 and once in 1894.

"Q. About what time in 1894.

"A. He drove out there when we were working on the section line road; it was in June, I think.

"Q. Did he come alone?

"A. Yes, sir.

"Q. What did he do while he was there?

"A. He looked at the work.

"Q. How long did he stay?

"A. I think two or three hours." (Record, p. 273.)

On cross-examination Bush testified:

"Q. You say that after this contract was let you were about three months getting ready for the institution of active operations.

"A. Well, yes, sir. (Record, p. 288.)

"Q. Now, what was McMullen doing during that time in connection with the matter?

"A. I do not know; we had some correspondence with him.

"Q. Do not you know it to be a fact that Hoffman's office here was in constant correspondence with McMullen's office, calling upon him to render aid in San Francisco in connection with the same matters that you were engaged upon here?

"A. Yes, sir, he corresponded with him to some extent.

"Q. A very considerable extent, was it not?

"A. Well, I do not know, it might be called so.

"Q. *Is it not a fact Mr. McMullen, to a great extent, did exert himself in San Francisco to advise Mr. Hoffman in regard to these matters, and to look out for workmen and for implements, tools, and everything of that sort needed for the work?*

"A. *I think he did all he could, apparently.*

"Q. *Is it not a fact that he did all that you called upon him to do?*

"A. *Yes, I think so.*

"Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it?

"A. I understood it so.

"Q. From whom did you get that understanding?

"A. Well, I think from Hoffman.

"Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly?

"A. No, sir.

"Q. *I will ask you to state if any call was made upon McMullen at any time you were connected with the office for anything in the way of help toward the execution of this work, except in the matter of supplying money, that McMullen did not respond to.*

"A. *I should say that he responded to everything except in the matter of furnishing money.* (Record, p. 289.)

"Q. What was it during the first summer up to the twentieth of September; how did the plant furnished by McMullen correspond with the plant which was obtained elsewhere?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

"A. I should guess it might be one-third of the whole amount." (Record, p. 290.)

It will be borne in mind that it is charged in the bill (record, p. 8) and admitted in the answer (record, p. 39) that Hoffman was to be the active superintendent of the work. McMullen was not expected to render any assistance on the ground.

With regard to the matter of a bond McMullen testifies (record, pp. 167, 182–3) that he offered to assist in its procurement, but that Hoffman voluntarily assumed to get it, and never made any request of McMullen to assist in the matter. The sureties on the bond were P. L. Willis, Hoffman's legal adviser, and G. W. Bates, his former associate in business. Willis testifies on cross-examination (record, p. 378) :

"Q. Referring now to the matter of giving this bond you say that Hoffman said that McMullen was unacquainted here, and that it would devolve on Hoffman to give the bond—Hoffman did not express reluctance to giving it, did he?

"A. Not that I recollect of.

"Q. He did not lodge any complaint against McMullen at that time about not giving the bond or part of it?

"A. Not to me.

"Q. Did not he with perfect willingness procure the sureties on this bond, so far as you know?

"A. So far as I know, yes."

Bates testifies on direct examination as a witness for respondent (record, pp. 412–3):

"Q. You were one of Mr. Hoffman's bondsmen, I believe?

"A. Yes, sir.

"Q. What do you know about Mr. Hoffman having any difficulty about getting his bond?

"A. I do not think he had any difficulty, as far as I know.

"Q. You do not know whether he had any difficulty in consequence of having to get the bond?

"A. No. He asked me if I would go on his bond, and I told him I would. I forget who the other party was."

Not a word was ever heard about the giving of this bond until Hoffman attempted to use the matter for the purpose of defrauding McMullen out of his share of their profits.

In regard to financial questions between the parties we beg to refer the court to the discussion we present in connection with McMullen's appeal (*infra*, pp. 244-255) saying only at this time that *Hoffman did not undertake to dissolve the partnership because of any past delinquency on McMullen's part, but only threatened to do so if McMullen did not send him $10,000 by September 20.*

Hoffman writes on September 14 (record, p. 579):

"Our estimate is $66,000, and they have $40,000 that they are going to divide equally among all the contractors, so we will get about $20,000, and after paying Wolf & Zwicker and Cook & Kiernan their pro rata, we will have about $9,000 left to pay about a $22,500 pay-roll, station men included, besides iron gates and supplies besides this month. Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in, but you can see the necessity of having money. IF YOU WILL FURNISH $10,000 BY THE 20TH, I WILL CARRY ON THE CONTRACT THE SAME WAY I DID BEFORE, but this amount I must insist on your furnishing or you must let go, and I will get some one in that will furnish part of the money."

On September 16 Hoffman writes (record, p. 580):

"Now, I want to tell you once for all THAT UNLESS YOU PUT UP YOUR SHARE OF THE MONEY, NAMELY, $10,000, BY THE 20TH OF THIS MONTH, I

shall not recognize you in this contract after that date, and shall make such arrangements as I see fit."

McMullen answers this letter by saying (record, p. 560):

"I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do thus and so. You must understand that nothing that you can do will change my rights in the premises, and if you attempt anything of the kind you will only injure yourself."

The representation of the status of affairs made in Hoffman's letter of September 14 was in fact false. The August estimate was $74,229.83, of which ninety per cent., or $66,806.84, was payable September 20. Dodge testifies for respondent (record, p. 405):

"Q. Now, when was the first time that you knew or were aware that the bonds had been sold and the money paid for the September payment?

"A. On the twentieth of September, about three o'clock.

"Q. Up to that time what steps had been taken looking to the payment of the bills that should fall due on the 20th?

"A. Warrants had been drawn for 30 per cent. of the amount due to the contractors. The

money was divided pro rata by the committee and warrant drawn for each contractor—there were four of them—for 30 per cent. of the amount due to each.

"Q. Of whom Mr. Hoffman was one?

"A. He was one."

It is agreed between the parties (record, p. 121) that on September 1 there was on hand to the credit of the work $14,130.95, to which add $20,042.05, the percentage which the water committee had informed Hoffman it would pay at all events on September 20, and the result is $34,173. The amounts payable September 20 were as follows (record, p. 122):

Pay roll for August	$11,982.40
General accounts	1,198.34
Audited vouchers	9,737.68
Wolff, Zwicker & Buehner	24,741.37
Cook & Kiernan	5,102.43
	$52,762.22

But, as is also agreed between the parties (record, p. 119) Wolff, Zwicker & Buehner and Cook & Kiernan were to be paid only as Hoffman was paid by the city, so that if Hoffman had gotten only one third of his estimate they would have been paid only one third of theirs.

The statement therefore would have stood:

Pay roll for August	$11,981.40
General accounts	1,198.34
Audited vouchers	9,737.68
Wolff, Zwicker & Buehner	7,422.41
Cook & Kiernan	1,530.72
	$31,871.55
Amount avaible for payments	$34,173.00
Total to be paid	31,871.55
Surplus	$2,301.45

Thus it is seen that when Hoffman wrote his letter of September 11 he actually had in hand $2,301.45 more than was required to discharge all of the September bills necessary to be paid.

Again it is stipulated (record, p. 122) that the city paid Hoffman on September 20, $66,806.58, to which add $14,130.95 previously on hand, *and after paying all the September bills in full there was left a balance of $28,175.31.*

Now as a result of these calculations we may say primarily that Hoffman never had any such cause as he represented to McMullen for undertaking to dissolve the partnership on September 20.

It is true that McMullen could not have required Hoffman to advance money to the firm on his (McMullen's) account, but Hoffman *had vol-*

untarily advanced all the moneys which were under consideration, and in his letters of September 11 and 16 he did not undertake to dissolve the partnership for any past or existing delinquency of McMullen's. HE CONDONED EVERY THING OF THAT SORT AND SIMPLY THREATENED TO DISSOLVE IT IF MCMULLEN DID NOT PERFORM A FUTURE ACT.

Now with reference to this future act, no court would allow Hoffman to avail himself of it as a ground for dissolving the partnership and expelling McMullen from his interest therein without good reason, and no such reason existed in this case. Hoffman could not arbitrarily require McMullen to advance $10,000, nor put him in default for not doing so, and therefore unless this money was actually needed for the prosecution of the partnership business McMullen's rights could not be affected in any wise by his failure to advance it. We have seen that, so far from being needed, Hoffman paid all of his debts at the time he had notified McMullen to make payment and had nearly $30,000 over.

Again, Hoffman and McMullen, being partners were the joint and equal owners of the moneys paid by the city, and instead of the $10,000 demanded of McMullen, he paid through the city on the very day designated, or the city paid for his account, over $33,000. It was of course entirely immaterial where the money came from, and thus the contingency upon which Hoffman threatened to dissolve the partnership never arose.

This partnership was for a special venture and was intended to last until the venture had been accomplished. McMullen's wilful refusal to go on with the partnership work, or his substantive failure to comply with his part of the agreement might have warranted Hoffman in seeking a dissolution in the courts. But McMullen did not wilfully refuse at any time to do his part, his defaults were not sufficient to warrant Hoffman in dissolving the partnership, and Hoffman could not do it in the manner resorted to by him.

In *Hart vs. Clark*, 6 De Jex, M. & G., 232, a mining venture was entered into upon a stipulation between the parties thereto that they should contribute certain sums of money towards the prosecution of the enterprise, and should share in its results. No regulation was adopted by the associates providing for the expulsion of a member. One of them, however, failed to comply with the calls made upon him for contributions of money, and in consequenee of such failure, his associates undertook to expel him from the enterprise, and to appropriate his interest. Lord Justice Turner said (p. 250):

"This is an adventure in which as to the material part of the property embarked in it there was a legal interest vested in the plaintiff. Up to the moment when the alleged declaration of forfeiture was made the plaintiff had beyond all question a joint interest in the adventure, and it is difficult to see how the alleged declaration of

forfeiture, which there was no authority to make, could operate to destroy that interest, or to alter or affect it. The decree seems to have proceeded upon the ground that, no time being limited for the duration of the adventure, the defendants had full power to determine it; and that it was determined by the declaration of forfeiture. But the object of that declaration was to determine the adventure, not as to all the adventurers, but as to the plaintiff alone, entitling the defendants to the plaintiff's share; and I do not see how, in the absence of any special provision for the purpose, the defendants could have the right so to determine it.

"Assuming, however, that the declaration of forfeiture worked a determination of the adventure so far only as the plaintiff was concerned, does it follow that the defendants were entitled to take the plaintiff's share at its then value. In ordinary partnerships, dissoluble at will, the dissolution of the partnership must be followed by the winding up of the concern; no partner is entitled to take to himself the share of another partner, at its then estimated value; and, without going the length of holding that mining adventures are to be considered in all respects as trading partnerships, I certainly am not prepared to hold that there is so great a difference between them as could entitle the defendants so to take the plaintiff's shares. Special provisions may be, and no doubt generally are, inserted in agreements for

carrying on mining adventures to provide for the event of any of the adventurers making default in payment of their due proportions of the expenses of the concern; but, if there be no such provisions contained in the agreements, I cannot think that the adventurers who have paid up, can be entitled to take the law into their own hands as against the defaulters. Resort must as I think in such cases be had to a court of justice to determine what is right to be done between the parties."

The case of *Hartman vs. Woehr*, 18 N. J. Eq., 383, is to the same effect. There three parties entered into a contract to conduct the business of brewing beer. After Hartman had contributed about half the amount of money which he was required to advance by the articles of co-partnership, and the other parties had contributed more than they were required to advance, they undertook to expel Hartman from the firm on the score that he had not complied with his engagements. Hartman sued for an account of the operations of the firm and succeeded. The Chancellor said (p. 385):

"They deny that he [Hartman] is, or ever was, a partner, on the ground that he has never complied with the partnership agreement by paying up his share of the capital. The position taken on their part is, that until that is paid up, he is not admitted as a partner. But this agree-

ment was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in $10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement, $5,667 of his share; and the defendants accepted it, and used, and continued to use, the property in the partnership business. Neither of them paid up his share at that time, but at the intervals of weeks or months afterwards. But the business of the partnership—the erecting of the brewery, and manufacture of beer—went on; each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has, in all things, complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership. In this case, Hartman put in his property, which was taken, and is still used for the business of the firm; he and his property are liable to all the debts of the firm, not only to the notes given in his name, but to all debts incurred, both before and since the thirty-first of January, 1866; and if the firm is unfortunate and fails, he may be stripped of every dollar he is worth. The defendants had a remedy if he did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this

agreement, he was a partner for five years, unless the partnership was sooner dissolved.

"It was not dissolved by the advertisement of January thirty-first, or by excluding him from the management of the concern. These may constitute a good cause for dissolution; and as he has prayed for it, and the defendants deny his interest tion refuse to admit him as a partner, the dissoluand must be decreed.

"Hartman, being a partner, is entitled to an account of the profits. Even where the partnership has been legally dissolved, and one of two partners continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is, at his option, entitled to his share of the profits made while his property is thus used; this is settled by a series of well considered cases. See Story on Partnership, Sec. 343; Collyer on Partnership, Sec. 324. This account must be made, with such allowance for the services of the partners who have carried on the business as, under the articles of partnership, is just; and also with allowance of interest for the amount furnished by them in excess of their share of the capital; and the complainant must be charged with interest on the share of the capital to be furnished by him, that was not paid in."

This case exactly covers the one in hand. Hoffman appropriated and used McMullen's property; and if the venture had proved a disastrous

one, McMullen and his property would have been liable for all the debts of the firm.

So, also, in *Ambler vs. Whipple*, 20 Wall., 546, where Ambler and Whipple entered into a co-partnership agreement for the purpose of dealing in inventions and patents. Ambler was the inventor and Whipple furnished the means. After Ambler had perfected a valuable invention Whipple undertook to expel him from the firm on the ground of his misconduct and failure to discharge his duty to the firm. Ambler sued for an accounting. Mr. Justice Miller, speaking for the court, said (p. 557):

"What weight would be given to the charges of bad character, drunkenness, and dishonesty in a suit by Whipple to dissolve the partnership we need not here state. If all that is charged were proved in such a suit it would make a strong case for relief, on such terms as equity might impose for the protection of both parties. But they did not authorize Whipple, of his own motion, to treat the partnership as ended and take to himself all the benefits of their joint labors and joint property."

In *Kimball vs. Gearhart*, 12 Cal., 27, several parties agreed to construct a water ditch, towards the prosecution of which they were to severally make contributions, It was alleged that Howe, one of the partners, had failed to make good his contribution, and his associates undertook to ex-

pel him from the firm, and to appropriate his interest in the property. The court said (p. 48):

"An ingenious argument is made by the appellant's counsel to show that by the failure of Howe to pay his proportion of expenses, the estate he had was forfeited as on a condition subsequently broken, and that all remedies and rights touching the estate, by relation, attached to the other property. We are unable to see the force of the argument. * * * * * Kimball and Howe were partners in this adventure, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property."

The most valuable asset which the partnership of Hoffman and McMullen had in September, 1893, was the contract with the city of Portland, and this was as much the property of McMullen as of Hoffman. Had the partnership been dissolved at that time, this contract must have been sold to the highest bidder and would have gone to McMullen, if he had been willing to pay more for it than any one else, or else the contract should have been worked out for the joint benefit of the partners. McMullen had also contributed one third of the plant and had rendered personal services to the firm. Hoffman could not violently seize McMullen's interest and appropriate it to

his own use. If any ground for terminating the partnership existed, which we deny, he had his choice to bring a suit for a dissolution and foreclose McMullen's interest by due process of law, or to proceed with the work in hand, which was already under his superintendency until its completion, and on the basis of the profits earned to account to McMullen for his interest. He chose the latter alternative.

It is also perfectly clear that Hoffman never understood that had terminated the co-partnership. He charged his account for salary on his books regularly from May 1, 1893, to December 31, 1894, and drew it for the whole time. (Record, p. 119.)

McMullen testifies (record, pp. 169, 170):

"Q. I will ask you to state whether, at any time, you made demands upon Mr. Hoffman for information in regard to these particulars.

"A. Yes, I made demands upon him.

"Q. What time was it?

"A. About the fourth of December, 1894.

"Q. What was the result?

"A. He refused to accede to my request, and declined to permit me or my representative to inspect the books and accounts of the job.

"Q. What reason did he assign for, if any?

"A. I don't think he assigned any reason.

"Q. You may state whether or not anything was said or discussed between you as to the fact of your interest in the work or its proceeds as an owner.

"A. He never denied my interest in the work.

"Q. My question is whether or not there was any discussion between you on that point.

"A. Yes, there was; I don't know that there was any discussion on that point—when I asked him to show me the books and when I desired to get a general idea of the books—of the condition of the job; he always met me with the proposition to know what I would take for my interest in it, and I always declined to make any offer, to accept any sum, unless the books were disclosed, and that was about the sum total of what transpired at the meeting on the fourth of December, 1894.

"Q. Upon what ground, if you assigned any, did you make your demand for an inspection of the books?

"A. On the ground that I was a partner on the job, and had as much right to see the books as he had.

"Q. And what was his response?

"A. Well, his response was—he got ill-tempered, and his response was that I could not see the books.

"Q. Now, you may state whether or not you ever made a request upon him for a statement or information as to the amount of money which had been earned in the execution of this contract apart from an inspection of the books.

"A. Well, I made a demand on him for a statement of disbursements on account of the job, and the moneys earned; I had a public knowledge, that is, they were public in the papers that could be seen at the water committee's office, of the amount of the estimates every month.

"Q. What was his response to that?

"A. Well, he declined absolutely to give any data whatever relative to the job, and always coupled it with the proposition that I should name a price for which I would sell out."

In what has been stated above we have followed the reasoning of the authorities quoted, and accepted the theory that where a partnership has been entered into for a stated term or a particular adventure, it is not determinable at the will of either of the partners until the time originally contemplated has elapsed. While there is a divergence in the authorities upon this proposition, those which support the theory here advanced have seemed to us to command most respect. This theory of course carries with it the result that whatever declarations one partner may make,

or whatever action he may take, in an attempted termination of a partnership, the parties are nevertheless partners until the term for which they embark in the partnership enterprise has run, unless for good reason the courts are appealed to to effect a dissolution.

In *Karrick vs. Hannaman*, 168 U. S., 328, a case very similar to that in suit was presented to this court. The facts were that the parties to the suit entered into a written agreement of co-partnership, February 3, 1886, by which they were to become partners in a mercantile and laundry business for a term of five years from that date. The capital was $25,000, of which the plaintiff was to furnish $5,000 and the defendant $20,000. The plaintiff was to give his entire time and attention to the partnership business, and the defendant was to devote to it only such time as he saw fit. The plaintiff was to have the general and exclusive control and management of the business, except as to such matters as the defendant might designate, or as should be mutually agreed upon. The excess capital stock advanced by the defendant was to be refunded to him at the expiration of the term of the partnership, and at the end of the term the profits and losses were to be equally shared.

On February 1, 1888, the defendant took possession of all the partnership business and assets and excluded the plaintiff from any further management or participation in the business. The

plaintiff alleged that up to that time he had performed his part of the agreement and stood willing to continue so to do. The defendant carried on the business after February 1 for his own exclusive benefit and applied to his own use the profits realized. On January 1, 1890, the defendant sold out all of the business to a third party. April 17, 1890, the plaintiff brought a suit praying for the dissolution of the partnership, the appointment of a receiver, an injunction against the defendant's interfering with the property, its application to the payment of the partnership debts, and a division of the remainder between the partners, accompanied with a prayer for a cancellation of the sale of the property and an accounting between the partners.

The defendant admitted the partnership and his taking possession of the business on February 1, but denied the other allegations of the complaint, and alleged mismanagement on the part of the plaintiff and a dissolution of the partnership at that time by mutual consent. The cause went to a referee, who, on October 5, 1891, made a report finding the issues in conformity with the allegations of the complaint and awarding plaintiff $12,040.53.

The suit having originated in the Territory of Utah, went from the supreme court of the Territory up to this court. In the territorial supreme court the plaintiff was given a decree for

$10,540.53, which decree was affirmed by this court.

The question was raised before this court, but was not decided, whether a partnership for a definite term could be dissolved at the will of one of the partners, this court holding that it was entirely immaterial whether the partnership should be deemed terminated or not, as the rights of the parties upon a final settlement in either case would be the same. On page 337, Mr. Justice Gray says:

"A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Bagley vs. Smith*, 10 N. Y. 489; *Dennis vs. Maxfield*, 10 Allen, 138. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Ambler vs. Whipple*, and *Pearce vs. Ham*, above cited; *Hartman vs. Woehr*, 3 C. E. Green (18 N. J. Eq.), 383; *Freeman vs. Freeman*, 136 Mass. 260; *Holmes vs. Gilman*, 138 N. Y. 369; 3 Kent Com. 64."

BRIEF AND ARGUMENT ON McMULLEN'S APPEAL.

We shall endeavor to present within a limited compass the case offered by McMullen on his appeal. His assignment of errors is to be found on pages 36–41, *ante*. By reference to this assignment it will be seen that McMullen complains of the decree of the circuit court in the following particulars, viz.:

1. That the court made an excessive allowance of salary to Hoffman for his superintendency of the work; and that instead of $20,000, or $1000 per month, there should have been allowed him only $8000, or $400 per month.

2. That Hoffman is chargeable with interest on one-half of the aggregate amount of money drawn by him and respondent, from time to time, and appropriated to their own use.

3. That the costs of suit should have been taxed against respondent.

4. That McMullen should have been given a decree for $62,147.19 together with his costs of suit, instead of $52,519.80 with costs of suit chargeable against the common fund.

Nothing is better settled in law than that in the absence of a clear understanding and contract between themselves to such end, neither member of a co-partnership is entitled to a salary for his services.

In *Frazier vs. Frazier*, 77 Va., 775, it was held by the court of appeals of Virginia, that the allowance of compensation to a surviving and managing partner, on the settlement of partnership accounts, for services rendered by him in attending to the business of the partnership, was, in the absence of an agreement to that effect, plainly wrong, and in violation of the well settled rule of law upon the subject. The law is fully and accurately stated in this opinion. It is said (p. 792):

"Upon the appeal here, the first assignment of error to be passed upon by this court is the allowance of an annual salary to the surviving partner, William Frazier, under the circumstances of this case. This is a question which has been most elaborately argued on both sides; but which appears to the court to be well settled by the decisions of this court.

"In the case of *Forrer vs. Forrer*, in 29 Gratt. 134, Staples, J., speaking for the whole court, said: 'No rule of law is better settled than that one partner is not entitled to compensation for his services while employed in the partnership business, unless it be so agreed between the parties.' The doctrine is thus laid down by a writer of ac-

knowledged merit: 'As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect. And there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount.' Collyer on Partnership, section 183. See also Strong [Story] on Partnership, section 182; Parsons on Partnership, page 130.

"In *Franklin vs. Robinson*, 1 Johnson Chancery Report, Chancellor Kent said he knew of no case which entitles one partner to charge for his services, except upon the ground of special agreement. In another case it appeared that one of the partners had taken the almost entire and exclusive charge and superintendence of the business of the firm, and yet it was held that his claim for compensation could not be allowed. *Phillips vs. Turner*, 2 Dev. & Battle Eq. R.; *Patton's Ex'or vs. Calhoun's Ex'ors*, 4 Gratt. 138.

"The reason for this rule is, each partner in taking care of the joint property, is, in fact, taking care of his own interest, and is but performing his own duties and obligations growing out of the partnership. These duties and obligations are supposed to enter into and constitute a part of the consideration for others to engage in the

business with him. The partners are considered as meeting on a common ground, each engaging to do all that he can do for the common good.

"In the second place, the law cannot undertake to measure and settle between the partners the relative value of their various and unequal services bestowed on the common business, and for the obvious reason it is impossible to see how far the relative experience, skill, ability, or even known character and reputation of each entered as ingredients in the adjustment of the terms of the partnership. If a partner is unwilling to perform any very unequal service without reward, he ought to stipulate that it be allowed him. In the absence of such stipulation, it must be presumed he is willing to render the service without remuneration. Parties assuming this relation are presumed to know the law, and to intend to be governed by it, unless they agree to be bound by some other rule. It is a mere question of degree. So soon as the courts undertake, upon a mere estimate of a partner's services, to award compensation in one case, they must do so in all cases where the skill, labor and diligence are unequally bestowed. This would be simply to abolish the rule of law, and to place the right to compensation not upon contract, but upon the principle of *quantum meruit*. It will be found, upon examination, that the doctrine of nearly all the cases is, that compensation can only be allowed where there is an *express*

agreement to that effect, or one necessarily to be implied from the conduct of the parties."

And in *Cunliffe vs. Dyerville Manufacturing Co.*, 7 R. I., 325, the supreme court of Rhode Island said (p. 327):

"A contract of co-partnership presupposes it to be for the common benefit of all of the co-partners; and there being no stipulation to the contrary, that each shall devote as much of his skill, capital, or labor, as may be necessary for the attainment of the ends for which the co-partnership was formed, without separate reward. Contracts of this character are defined to be a *joining* together of the money, knowledge, experience, or labor, of two or more, voluntarily, and for a common purpose. This common purpose is ordinarily a common pecuniary gain. Each co-partner receives, or expects to receive, his compensation out of this common profit or gain."

It is true that in his bill McMullen, not under stress of any obligation but in a spirit of liberality, expressed a willingness to concede to Hoffman a fair measure of compensation for the service he had rendered the firm, but he never supposed that in so doing his own services were to be totally ignored, or that any exorbitant allowance would be made Hoffman. In his appeal McMullen acquiesces in an allowance to Hoffman of $400 per month, saying nothing of any compensation to himself, and we submit that this is ample pay-

ment to Hoffman for all he did, even if McMullen had done nothing whatever. If the universal rule which prevails in such cases were applied here Hoffman would get nothing, and the court is not warranted in making of McMullen's failure to insist upon this rule an occasion for dealing lavishly in his property rights for Hoffman's benefit.

We understand that respondent attempts to justify the allowance of $1000 per month to Hoffman upon these grounds, viz.:

1. That Hoffman had the burden of the active superintendency of the contract with the city, and the other work performed in connection therewith.

2. That Hoffman was required to provide a bond.

3. That Hoffman was put to great effort and sacrifice to raise money to carry on the work in the summer of 1893.

In answer to the first point we say that Hoffman was required to do nothing more than he had agreed to do, without any stipulation for compensation, by the terms of the contract which served as the inducement for McMullen to go into partnership with him. The contract makes no stipulation for compensation to Hoffman, and there is not a particle of evidence in the record going to show that it was ever agreed between him and McMullen that he should receive any compensation.

McMullen testifies:

"Q. I will ask you to state what the arrangement was between Mr. Hoffman and yourself in regard to the active supervision and prosecution of the work contemplated by your contract, exhibit No. 1?

"A. Well, it was agreed and understood between us that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, because he resided here, and knew the water committee, and the engineer, and was familiar with everything here, and it was also agreed that inasmuch as we had an office in New York, we had an office in San Francisco, and an office in Seattle; it was agreed that any outside business that was to be transacted in the interests of the partnership at these places would be attended to by the San Francisco Bridge Company at my direction. (Record, p. 167.)

"Q. You say it was understood that Mr. Hoffman was to do the business here in Oregon —whatever there was here he would do it?

"A. We arrived at that conclusion when we determined to put in a bid in his name.

"Q. But if there was anything to be done outside, you were to do that in San Francisco, New York, or Seattle?

"A. Yes, sir.

"Q. That was a part of your agreement that you were to do that?

"A. That is right." (Record, p. 185.)

Bush, respondent's witness, testified (record, p. 289):

"Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it?

"A. I understood it so.

"Q. From whom did you get that understanding.

"A. Well, I think from Hoffman.

"Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly?

"A. No, sir."

In the correspondence exchanged between the parties, which is to be found in the record, there is not the slightest suggestion that Hoffman expected to be paid, or that McMullen expected he should be allowed, any salary. Hoffman never even suggested that the duties which he was performing were more onerous than those falling on McMullen. On the contrary his only complaint was that McMullen was not furnishing his proportionate part of the money, and in his letter of September 11, 1893 (*ante*, p. 6), he writes: "*If you will furnish $10,000 by the twentieth, I will*

carry on the contract the same way I did before." Of course Hoffman's own book entries touching his salary cannot be used as evidence to bind McMullen.

The character and extent of Hoffman's responsibilities and labors have been greatly magnified by respondent. It is stipulated (record, p. 119) that the work of manufacturing the pipe and of hauling it from the factory to the place where it was to be used was sublet to other parties, the one amounting to $180,000 and the other to $36,000, (record, pp. 421–2) thus relieving Hoffman and McMullen from the most burdensome part of their contract, and leaving to them only the work of excavating the trench, placing the pipe in it, and covering it over; the value of the contract work being reduced to $249,667. Hoffman, himself, was only nominally superintendent of the work. Bush testifies (record, p. 272):

"Q. After the letting of this work—this contract—what did you do?

"A. You mean as regards construction?

"Q. Yes, sir.

"A. Well, there was a space of three months before the work actually begun, and I did everything I could towards getting ready, getting tools prepared, and when the work first started my principal work was going back and forth between the shop and field, trying to get the pipe out

there, and getting the pipe made fast enough at the shop; the subcontractors were very slow at first in getting the pipe from the shop; and in a general way I got ready all the tools for riveting, and I hired a good many riveters and sent them out—riveters and calkers—and I went over to Vancouver at one time; I only got one man there that I intended to make a foreman of; he afterwards had a subcontract for the riveting and calking. *Mr. Foy was made superintendent of the work.*

"Q. What time?

"A. At the beginning of the actual construction.

"Q. Do you know when that was?

"A. That was early in June.

"Q. How long did he continue as superintendent?

"A. I think until the first of November, 1893.

"Q. Of the same year?

"A. Yes, sir.

"Q. *Who became superintendent after he quit?*

"A. *I was superintendent after that time.*

"Q. *Until the completion of the work?*

"A. *Yes, sir.*"

On cross-examination Bush testifies (record, p. 292):

"Q. He [Hoffman] was not giving his exclusive time and attention to this contract, was he?

"A. I think he was giving most of his time and attention to it.

"Q. Most of it?

"A. Yes, sir.

"Q. Well, what proportion would you say?

"A. Well, I should say at least three-fourths of his time."

And again:

"Q. What I want to get at is this: When did Mr. Hoffman's active superintendence and contribution of his time in whole or largely so towards the conduct of this work cease?

"A. Well, I should say his active work might be considered to have extended up to the first of December, 1894; after that he did not have so much to do. Of course, there were a few men out there all the time during the six months that we had to keep the line in repair.

"Q. Then I understand that Mr. Hoffman was continuously engaged on the work as superintendent from June, 1893, to October, when he went to the World's Fair, and then upon his return from the World's Fair in October until January, 1894, when the work was shut down, from January, 1894, to March, when operations

were resumed, and then from March until the following December?

"A. Yes, that is the time when we had the most to do. From last December on several months we got telegrams almost every day about leaks on the line." (Record, p. 294.)

In addition to an active superintendent of the work the testimony of A. Donnell proves that a bookkeeper was employed (record, p. 248), and he was employed himself as "manager of the office" (record, p. 249). Donnell also testifies that during three months in the winter and spring of 1894 the work was practically suspended, the estimates being for insignificant amounts, while Hoffman was charging $1000 per month for his salary. So much for Hoffman's work.

March 16, 1893, Hoffman answers a proposition McMullen had made to sell his interest in the contract by saying (record, p. 496): "I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, *but as it is a new line of work I want your assistance.*" McMullen testifies (see especially record, pp. 167–8), and the correspondence shows, that he did render constant assistance to Hoffman in launching the work in the spring and summer of 1893, and Bush admits (record, p. 289) that McMullen *did all he could, and responded to every call made upon him, except in the matter of furnishing money.* This default was not wilful, but

the distressing financial stringency of 1893 had embarrassed McMullen along with innumerable other business men throughout the country.

McMullen testifies further (record, pp. 225–6):

"Q. You may explain fully just what you did do in connection with the procuring of this contract, and its execution, being as concise and collective as possible.

"A. Well, we started in to find out the cost of the job, and we started in with all our ability and resources to estimate with our engineering staff, which consisted of Mr. George W. Catt, who is in charge of our office in New York, and who is a civil engineer by profession, and an experienced contractor, and also Mr. Herman Krusi, our assistant engineer, and Mr. H. S. Wood, also a civil engineer, and we proceeded to estimate this job, and to gather data in the east as to the cost of other or kindred or similar jobs, one at Rochester, New York, and one in Jersey City, New Jersey.

"Q. How much time was given by these gentlemen to this work, approximately?

"A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract a very large portion of their time, and my own time, until the job was well under way, at the end of July or first of August, 1894.

"Q. Who paid these gentlemen during the time you were engaged in this work, and what were the salaries they were drawing?

(Objected to as immaterial.)

"A. The San Francisco Bridge Company paid their salaries; Mr. George W. Catt was paid a salary of $5,000 a year; and Mr. Herman Krusi was paid a salary of $3,600 a year, and Mr. H. S. Wood was paid a salary of $2,100 a year, and my own salary was $5,000 a year.

(Counsel for defendant objects to this testimony as immaterial.)

"Q. How much time did these gentlemen bestow on this work at your instance, or that of the San Francisco Bridge Company, if any, after the contract had been awarded, and the execution of the work was entered upon?

(Same objection.)

"A. Well, as I said before, the greater portion of their time from the date of the award to the end of August, that would be a period of about five months.

"Q. How much of your own time, between the letting of the contract and the twentieth of September, 1893, was devoted to the work?

(Objected to as immaterial.)

"A. A large portion of my time, I cannot say exactly, but looking back over the correspon-

dence, I find that there was almost daily something to be done in connection with this job."

The San Francisco Bridge Company and McMullen as to this work were one.

We find that Hoffman charged, and the trial court allowed, a salary from May 1, 1893, to December 31, 1894, twenty months in all. The testimony shows that active operations were not begun until June 1, 1893, and virtually terminated December 1, 1894, while, as has been shown, they were practically suspended for three months during the winter and spring of 1894. Hoffman has therefore been allowed compensation at the full rate for five months when he had little or nothing to do.

Hoffman could not of course take advantage of his own wrong and command a larger salary after he refused to co-operate with McMullen in September, 1893, than would have been proper had they continued together. The money matters between them were all adjusted by the payment made by the city September 20, and beyond this McMullen always responded, and stood ready to respond, to all demands made upon him.

So much has been said about the matter of Hoffman's advances of money that we feel warranted in giving the court a full exposition of that subject.

It appears from the record (p. 120) that on the first of July, 1893, McMullen had contributed to the venture $2,316.89; that prior to June 30, Hoffman had contributed $3,100.27; and that on and after June 30 up to September 20, when we shall show all of his advances might have been repaid, Hoffman made the following contributions:

June 30	$ 29.75
" "	72.90
July 1	7,000.00
July 28	5,000.00
July 31	3.64
" "	800.88
August 31	1,550.44

The total of all advances up to September 20 made by Hoffman was $17,557.88, and those made by both parties aggregated $19,874.77, of which amount Hoffman should have advanced $9,937.39. He therefore was required to advance for McMullen $7,620.49, and this could have been withdrawn September 20, 1893. If we allow two months interest at eight per cent., we find that Hoffman sustained an injury by McMullen's default of $101.60! This on work approaching half a million dollars in amount. The interest charge went of course as a credit to Hoffman and might have been withdrawn on September 20.

With regard to the efforts alleged to have been made by Hoffman to raise money and the sacri-

fices which he claimed to have made in that connection the following testimony is conclusive.

William M. Ladd, the managing partner of the banking house of Ladd & Tilton, called as a witness for respondent, testifies:

"Q. Now, I will ask you if you had any conversation with Mr. Hoffman in reference to arranging for funds to meet the bills that were likely to accrue on account of the work that he was carrying on in constructing this line of pipe—laying this pipe for conducting Bull Run water to Mt. Tabor?

"A. I understand that what you want to know is whether he came to get any money of me or to make any arrangements?

"Q. That is what I want to know, if you had any conversation on that subject.

"A. Yes, I had.

"Q. State what it was.

"A. As near as I can recollect, Mr. Hoffman came to me twice in regard to borrowing money, because he anticipated the possibility of the water committee not disposing of their bonds and be able to pay him the payments as they came due, so he wanted to be in a position to keep up with his sub-contractors; *I told him he could have the money, but he never came for it;* I think he did borrow money at different times of me, but I don't

think they were sufficient sums to warrant being for this particular work.

"Q. *He did not call for the money, but made arrangements for it?*

"A. *Yes, sir; he came and asked if he could have it in case he did not get it from the water committee, and I told him yes.*

"Q. Are you willing to fix the date of that conversation, or approximate the date?

"A. Well, I cannot fix the date beyond this, that it would be as the date approached for receiving his money from the (record, p. 354) water committee; now, Ladd & Tilton's books show that he received on the twenty-first, I think, of September, 1893, a large payment, which I think came from the water committee, because the check which went to his credit was on the First National Bank; I think that his books show that.

"Q. Now, do you remember if that conversation that he had with you was prior to that time?

"A. Yes, I cannot place the date, but I feel certain that it was; and then there must have been some other time when they were in the same fix, because I recollect he came twice at least in regard to the matter."

On cross-examination Ladd testified:

"Q. When was the other time, before or after this?

"A. I cannot say, Mr. Cox; it was during the panicky season, when the bonds were hard to sell and get money for them.

"Q. Are you able to determine that the conversation concerning which you first spoke took place prior to the twenty-first of September at all?

"A. Yes, sir, I think so; the reason for my thinking so is that he came, as I said, twice, and there might have been more times, and if he [we] could establish the question as to when the bond sale was made, it was prior to that time; it was then a question as to whether the sale would be made or not.

"Q. Assuming that the sale of bonds was made on the twentieth of September, 1893?

"A. I think the sale of bonds was made on the sixteenth.

"Q. On the sixteenth?

"A. I think one of the conversations was prior to that time, possibly both.

"Q. You are not sure about that?

"A. No.

"Q. Is it not a fact, Mr. Ladd, as far as your knowledge extends, that Mr. Hoffman was never in any apprehension of the shortage of money of the water committee until this September payment?

"A. That I cannot say.

"Q. Can you say that he was—do you recall his ever having made any representations to you that he was in any difficulty and in fear that he would not get his money from the water committee except this payment which was made to him on the twentieth of September? (Record, p. 355.)

"A. I don't know that he said he was in any difficulty at all; *my impression is that he came to me when he first made the contract, and talked about money matters in case he needed money to carry out the contract, he wanted to know if he could depend upon it;* he was in the habit of asking for funds from time to time whenever he required money to carry on his bridge contracts; he always had collateral on deposit in our vault, so that that was there, and while I cannot place any particular date, I can remember his coming to the side counter there and talking with me in regard to the difficulty he anticipated in regard to the water committee not getting this money. (Record, p. 356.)

"Q. You say it was customary with Mr. Hoffman to get these accommodations from you in his general business?

"A. Yes, he would get them at times; I don't think that in late years he was very much of a borrower for his bridge business; he had some matters with Mr. Willis that he had some notes along at times; but I looked yesterday at his in-

dividual account, and there was in September a balance there of $15,000 to his credit.

"Q. To his credit?

"A. Yes, sir.

"Q. His individual account, or his Hoffman & Bates' account?

"A. His individual account.

"Q. How was his Hoffman & Bates' account?

"A. Something about $13,000 at the commencement of the month, and run down possibly to about $11,000; I did not pay special attention, but I just run my fingers across the line.

"Q. I understand that all that passed between Hoffman and yourself at this time that he thought he would fail to get his pay on the twentieth or twenty-first of September, 1893, was that he came to you and asked if in default of getting that estimate you would advance him sufficient money to carry his pay-roll and other expenses at that time, and you told him you would do so, and that he went off and never returned to follow the matter up.

"A. I do not recollect that he said anything about pay-rolls or anything of that kind; he said his needs might be for money to take care of his payments, but I did not go into the question of detail of what his payments were.

"Q. To make his general payments? (Record, p. 357.)

"A. *He asked me if he could have money in case he needed it; I said, 'Yes, sir,' but he did not come back to get the money; I think he got his money each month.*

"Q. Is it a fact what took place between you on the twentieth of September, that Hoffman put a check with you for deposit to his credit for a very much larger amount than he had outstanding?

"A. I don't know whether they were larger than he had outstanding; he deposited a large check, $60,000.

"Q. It was very much larger than the amount he drew against it in the next thirty days?

"A. I could not say without looking.

"Q. Did you examine his books to see the condition of his account after the twenty-first of September?

(Objected to as not cross-examination.)

"A. No, sir, I did not look to see whether in the month of October there was any payments made to him; I don't recollect what his balance run in October; the only recollection that I have of his balance is in the month of September it continued the same without any particular variation; Hoffman & Bates' account was increased on the twenty-first of September by a deposit of $66,000, and that same day I think he checked for about twenty odd thousand dollars." (Record, p. 358.)

P. L. Willis testifies as a witness for respondent (record, pp. 363–4):

"Q. Now, Mr. Willis, did Mr. Hoffman tell you anything about the matter of procuring funds for carrying on this work?

"A. Yes, Mr. Hoffman was very much troubled about means for carrying on the work. His contract was let only a few months before the financial depression which struck us in July, 1893, and immediately after which it appeared almost impossible to raise funds. He told me Mr. McMullen was unable to furnish any money towards the prosecution of this work, and he was very fearful that he would be unable to raise sufficient funds himself, and indeed at times told me that he did not believe he could do it at all, and he put forth strenuous efforts, he told me, and some of this I was cognizant of, besides what he told me. He had an account for labor performed on some railroad work on the Sound, quite a considerable sum due him, that was admitted by the company whom the work was for, and another considerable sum that he claimed for force or extra work that was questioned by the company, and he, in order to secure funds and money for the preparation of this work, took the money which the company admitted, and abandoned his claim as compensation for extra work; it was only on that condition that the company would pay any sum, and he abandoned this claim—I think it was some $5,000—that he claimed for force work which he abandoned in

order to obtain about the same sum of money as I recollect it, upon the undisputed claim. That was for the purpose of having it to use in the prosecution of this Bull Run contract."

Robert Wakefield testifies as to this transaction:

"Q. You say that you were concerned with Mr. Hoffman in the bridges on the Great Northern?

"A. Yes, sir. (Record, p. 423.)

"Q. Who did you say the contract was with?

"A. Hoffman and Bates and Robert Wakefield.

"Q. That was yourself?

"A. Yes, sir.

"Q. When, if you know, was settlement made with the Great Northern for the work which had been done under that contract—the final settlement?

(Objected to by counsel for defendant as immaterial and irrelevant.)

"A. I do not know just when the final settlement was made. I disposed of my interest to Mr. Hoffman before that, and I do not know when it was made.

"Q. How much was owing from the Great Northern on this contract at the time you made your settlement with Hoffman? (Record, p. 424.)

(Objected to by counsel for defendant as immaterial.)

"A. Well, we claimed about $12,000.

"Q. Of what did that claim consist?

"A. It consisted of, I think, about $12,000 for a small bridge that we used and some bridges that had been washed out that they claimed they were not responsible for.

"Q. Well, I will put it to you in another way —was there any agreement between yourself and Hoffman on the one side and the Great Northern on the other as to the amount of your claim?

(Question objected to by counsel for defendant as immaterial and irrelevant.)

"A. Yes, sir.

"Q. What proportion was in dispute?

"A. Between $4,000 and $5,000.

"Q. How much was allowed?

"A. Well, I cannot say. After I sold out of course I took no further interest.

"Q. I mean while you were there; how much did you understand that they did not dispute?

"A. There was $12,000 altogether and between $4,000 and $5,000 in dispute, would leave about $8,000, actually conceded.

"Q. Now I will ask you if you know what those disputed items consisted of?

(Counsel for defendant objects to the question as immaterial and irrelevant.)

"A. They consisted of a small drawbridge that we used, and there was one span that had been washed out that we claimed they were responsible for and they claimed we were.

"Q. What amount was claimed for this drawbridge?

(Counsel for defendant objects to the question as immaterial.)

"A. *$2,000 was the claim.*

"Q. What had been the cost and what was the value of that drawbridge?

(Counsel for defendant objects to the question as immaterial.)

"A. *Well, I put it into the firm when I went into the firm with Hoffman at $500.*" (Record, p. 425.)

This is probably a fair illustration of what constituted Hoffman's *sacrifices*; and, if he made any, Ladd's testimony shows that they were entirely unnecessary.

This testimony conclusively corroborates what we have said above to the effect that Hoffman was guilty of falsehood in his letters to McMullen of September 11 and 16. He represented that he did not have money to meet his September payments *and could not get it.* We have shown that he actually had in hand the full amount required

of him, and Ladd's testimony shows that he might have had for the mere asking any sum which he at any time might have needed. McMullen of course had no right to require Hoffman to borrow money on his own credit for his (McMullen's) account, nor did he ask it. He made a perfectly rational and business-like proposition in his letter of September 14, that Hoffman should take city bonds on his estimates and borrow money on them as collateral for the prosecution of the work. Hoffman rejected this proposition and would consider nothing short of McMullen's sending him $10,000. The whole transaction bears manifest suggestion that Hoffman found by the large estimate for the August work the contract was going to prove a profitable one, and was attempting to avail himself of McMullen's misfortunes in order to drive him out of the contract and fraudulently appropriate all its gains to himself.

We realize that these suggestions would ordinarily be out of place in this connection, but they are made proper and pertinent by the attempt which respondent makes to justify the allowance of an extravagant salary to Hoffman on the score of his alleged difficulty in raising money to carry on the work.

Now as to valuations put upon Hoffman's services. McMullen produced as witnesses Robert Wakefield, John Bays, D. P. Thompson, J. B.

Montgomery, S. W. Aldrich and J. B. David, all residents of Portland or its vicinity. Respondent produced as witnesses H. C. Campbell, C. F. Swigert and G. W. Bates.

Wakefield testified (record, p. 426) that he had been a general contractor all his life; that he had been superintendent of bridge building for the Union Pacific and the O. R. & N. Co.; that he had done $300,000 worth of contract work for the Union Pacific; that he had built the terminal depot at Portland, the contract being $300,000; that he had built the cantalever bridge at Albany, Oregon, and the bridge over Snohomish slough. It may also be remarked that Wakefield was so friendly to respondent as to become a surety on her appeal bond. (Record, p. 115.)

Bays testified (record, pp. 431–2) that he had been a contractor for thirty-five years, chiefly in railway work; that he had worked on the Oregon & California Railway on a contract of over $370,000; that he had done $200,000 worth of work on the Siskiyou tunnel, and over $130,000 on the Wolf Creek tunnel.

Thompson testified (record, pp. 438–9) that he had been a contractor for about forty years in public surveys, construction of river jetties, building of railroads, constructing tunnels for railroads, and erecting waterworks; that one of his railroad contracts amounted to the sum of $7,000,000; that the contract for building the jetty at the

mouth of the Columbia river amounted to $250,000; that the tunnel work at the Bunker Hill tunnel and the Siskiyou tunnel amounted to perhaps $500,000.

Montgomery testified (record, pp. 446–7) that he had been a railroad builder and general contractor for some twenty-five years; that he had had a contract for building the Linden bridge across the Susquehannah river, was interested in the Oil Creek & Alleghany railroad, and had built forty-five miles of the Kansas Pacific; that he had built one hundred and forty-five miles of the railroad between Portland and Tacoma, and sixty or seventy miles of the Willamette Valley railroad.

Aldrich testified (record, pp. 456, 461) that he had been a contractor for about ten years on work of most all kinds, from waterworks to tunnels on railroads, and also in railroad building; that his contract for building the reservoirs on the waterworks system in controversy amounted to $70,000 or $80,000; that his railroad contract amounted to about $400,000.

David testified (record, pp. 480–1) that he had been a contractor for about twenty-five years. Had built roads, government work of different kinds, mills, railroads, etc.; that the largest contract he had been engaged upon was a railroad involving over $3,000,000; that he had had various government contracts, running from $50,000 to $150,000.

The following hypothetical question was submitted to each one of these witnesses (record, pp. 432–4):

"I desire to ask you this question, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was $465,667, and the contractor was required to furnish a bond in the sum of $140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, was to have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there, and in New York and Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe, amounting to about $180,000, was let on subcontract, as was also the work of hauling the pipe into position, amounting to about $36,000. The work under the Hoffman

contract was actually begun in June, 1893, and between March 10, 1893,—the date of Hoffman's contract with the water committee,—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing in San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During [this] time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from $1,600 to $2,300. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20, 1893. During this time an engineer and superintendent of the field work, to-

gether with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the months of June, July and August, 1893, the sum of fourteen thousand five hundred dollars, or thereabouts, which was covered by his estimate paid by the water committee on September 21 [20], 1893, and thereafter Hoffman did not have or need not have had any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6 and September 20, 1893?"

(Counsel for complainant objects to the question on the ground that it is based on an incorrect and incomplete statement of facts.)

Wakefield answered that Hoffman ought to have rendered his services as a partner in the concern, but that if he was going to have a salary at all, "you could not very well afford to offer less

than five or six thousand dollars;" and that in making this estimate he allowed nothing for what McMullen had done; that it was always the rule in such cases for both partners to devote such time as was necessary to the work. (Record, p. 429.)

Bays testified in answer to this question: "$400 a month, I should say, would be a big salary." That he had served as superintendent on the contracts above mentioned upon which he was engaged and never got more than $250 dollars a month. (Record, p. 434.)

Thompson testified that $5,000 a year would be full compensation to Hoffman, if McMullen had done nothing; and that if McMullen rendered services, the compensation allowed Hoffman should be influenced thereby; that at about the time this work was going on, the only similar work he knew of was a contract for furnishing stone for the jetty at the mouth of the Columbia; that the total contract was about $350,000; that Perry Hinkle (who was also a partner in the contract) had charge entirely of the work and received $150 a month for his service as superintendent; that Hoffman was a partner with the witness in this contract. (Record, p. 440.)

This witness made the following statement:

"As good men as I know of, or men that I would as readily have trusted as Mr. Hoffman—

and Mr. Hoffman was a trusty man, because I know from experience—could have been had for $200 a month. But I have estimated the responsibility that attached to Mr. Hoffman as having sole charge of the work without Mr. McMullen having anything to do, as $400 a month." (Record, p. 443.)

Montgomery testified that $500 a month to be charged against the firm would be an ample salary to allow Hoffman (record, p. 454); that when witness was engaged in the construction of railroad building in the Willamette Valley he had employed Hoffman and paid him $135 a month. (Record, p. 449.)

Aldrich testified that $325 or $350 a month would be an ample allowance to Hoffman. (record, p. 459); that he and a partner had had a contract on the Kalama Railroad for $350,000 or $400,000, and he drew a salary of $150 a month as superintendent; that he was general superintendent of everything. (Record, p. 461.)

David testified that $400 a month would be fair compensaton to Hoffman for his services; that the ordinary wages for people superintending that sort of work was from $200 to $400 a month (record, p. 483); that upon this same work Hinkle, who acted as superintendent of the laying of pipe, under a contract with three other parties, got $10 a day for his services; that on the job for furnishing stone for the jetty of the Columbia River,

Hinkle, who took charge of it, got $150 a month; Hoffman was one of the partners; that on the large railroad contract mentioned by witness, Bates, who was superintendent, got $250 a month for acting as general superintendent of the work, and he had a third interest in the contract; that Bates had eleven or twelve hundred men under him. (Record, p. 484.)

As against this testimony H. C. Campbell testifies that he had been a general contractor since 1886. (Record, p. 306.)

Thereupon the witness gave the following testimony. (Record, p. 307):

"Q. Supposing a man having that contract amounting to some $46,500, [$465,000] having to execute a bond for its performance to the amount of $140,000, required to furnish money for a plant to carry on the work, amounting to $15,000, or $20,000, had to provide the means for carrying on the work in the way of tools, and the best plan for conducting it, and having general superintendence of it—what do you say it would be worth per month for a man to do that sort of business?

(Counsel for the complainant objects to the question on the ground that it assumes an incomplete state of facts as shown by the evidence.)

"A. Well, it would be a very valuable position, and responsible one, to find a man to take

hold of it and do it; should think it would be a liberal salary.

"Q. How much?

"A. It would be a very liberal salary for a man to take that responsibility.

"Q. What sum would you say would be a reasonable salary for that work?

"A. I should think that a man ought to have one thousand or twelve hundred a month."

On cross-examination this witness testified that he did not have a very great appreciation of McMullen's services (record, p. 311); that he had made this allowance to Hoffman on the assumption that McMullen had thrown on Hoffman the burden of carrying the whole work through and had rendered him no assistance (record, p. 312); that he thought Hoffman's services were worth this much, regardless of anything McMullen did; that he had gotten a good deal of his knowledge about the matter from Hoffman. (Record, p. 313.) Then follows this testimony:

"Q. Now, what you know about this matter, Mr. Campbell, is what you have learned from Hoffman, is it not?

"A. A good deal of knowledge comes from him; yes, sir.

"Q. What do you know about it at all as to what McMullen did and what Hoffman did, except what Hoffman told you?

"A. I saw the work that was being carried on.

"Q. Saw Hoffman as active superintendent?

"A. I have been out that way over the work two or three times, and I know how the work was carried on, to a certain extent. I am quite well posted.

"Q. But your knowledge as to what McMullen did, or what he did not do, you gathered from Hoffman?

"A. You might say that; there would be no other way to gather it.

"Q. Mr. Hoffman talked with you frequently about this matter, did not he?

"A. Yes, sir.

"Q. Gave you his side of the grievance between himself and McMullen?

"A. Yes, sir.

"Q. And you formed an opinion in regard to these topics concerning which you have been giving testimony from this information communicated to you by Hoffman?

"A. Principally.

"Q. You and Mr. Hoffman were very close friends, were you not?

"A. Always very good friends.

"Q. And he communicated very freely with you in regard to this matter?

"A. We have often talked it over; yes, sir."

Swigert testifies that he had been treasurer and "sort of agent" of the Pacific Bridge Company since 1880; that the business of this company was general contract work (record, p. 335); that he had superintended the building of bridges, wharves, and some little grading work; that he had worked on one job in Central America, the price of which was $115,000; that the largest work he had done in Oregon and Washington was about $80,000 (record, p. 336); that he thought $15,000 a year would not be too much for Hoffman's services (record, p. 337); that witness had had a number of interviews with Hoffman touching the troubles between himself and McMullen, especially one in July, 1894 (record, p. 340); that witness was on very intimate terms with Hoffman and had been associated with him in business; that he had felt and expressed sympathy for Hoffman in his relations with McMullen; that this was based upon the representation of the matter which he had received from Hoffman (record, p. 341); that the extent of the witness's experience in railroad work was grading about ten miles of road in California; that he had furnished and laid water pipe in Astoria amounting to about $40,000 all told (record, p. 343); that on the railroad work mentioned witness was employed as

timekeeper (record, p. 344). On page 345 of the record this witness gives the following testimony:

"Q. Now, Mr. Swigert, do you know, during the whole time that you have lived in Oregon, any man on any similar work, whether in character or value, who has filled the position that Hoffman has filled, and who got $15,000 a year for his services or half of that?

"A. No; I do not know what they got.

"Q. Do you know any instance in which a superintendent, making a charge or claiming a charge against work in any degree similar to this, either in character or amount, has claimed or been allowed, whether he was the contractor himself or operating for others, one-half the amount which you say would be a proper compensation in this case?

"A. I do not know of any similar case; I do not know of anything that I would call a parallel case at all."

That on the Kenewick Bridge, which amounted to $300,000, and the snow sheds on the Northern Pacific, which ran up into hundreds of thousands, and which were constructed by Hoffman and G. W. Bates, they were both working partners, and Hoffman and Bates simply divided profits (record, p. 347); that if McMullen rendered services he should be allowed for them, and the value of McMullen's services should be deducted

from the allowance made Hoffman. (Record, p. 349.)

Bates testified that he had been a contractor for about nine years, principally in bridge building; that he thought the largest contract he had had was about $200,000, and Adler and Hoffman were his partners; that he was engaged in business with Hoffman for seven years; that he had talked over with Hoffman the matters in suit (record, p. 410); that he should judge $1000 a month would not be too much as compensation to Hoffman for his services (record, p. 412). On cross examination this witness gave the following testimony (record, p. 413):

"Q. Mr. Bates, have you ever known of anyone occupying the position Mr. Hoffman occupied on this work—engaged in any similar work—during the time that you have been a contractor in the state of Oregon, getting anything like the salary which you say would be a fair salary to allow Mr. Hoffman for what he did?

"A. No, sir.

"Q. What did you estimate [base] your estimate on, then?

"A. Simply on the responsibility of carrying on the work.

"Q. You understood, of course, that Mr. Hoffman was a partner, and was to get a half inter-

est in the proceeds of the job in addition to his salary?

"A. I should judge so; yes, sir.

"Q. Do you know of any other person occupying the position that Mr. Hoffman occupied in regard to this work who was ever allowed or paid one-half the amount that you say would be fair to allow Mr. Hoffman for his services?

"A. Not personally; no, sir.

"Q. What is the largest salary you ever knew to be allowed or paid to a person occupying Mr. Hoffman's position in connection with this work —with reference to any similar position on any similar work?

"A. Well, I do not know that I know of any.

"Q. Do not know of any?

"A. No, sir; I do not personally know of any.

"Q. Now, of course, you were on very friendly terms with Mr. Hoffman during his lifetime?

"A. Yes, sir.

"Q. On very friendly and intimate terms?

"A. Yes, sir; I was associated with him in business for seven years."

We get this monthly average of the estimates given by McMullen's witnesses:

Wakefield	$ 500.00
Bays	400.00
Thompson	416.66
Montgomery	500.00
Aldrich	350.00
David	400.00
	$2,565.66
Average	$ 441.66

Respondent has been given here the maximum figures stated by the witnesses, and no allowance whatever is made for McMullen's services. It seems nothing less than extraordinary that the trial court should have ignored the testimony of these disinterested and experienced men of affairs, and have based its findings on the testimony of respondent's three witnesses who admit that they were without experience in such matters, that they had never heard of any such allowances as those they testified were reasonable, that they were associates and close personal friends of Hoffman, that they were in sympathy with his side of the case; and whose minds had been poisoned by his recitals of the grievances he had against McMullen, which recitals were made after the occurrence of the breach between them.

We submit that the salary of $400 per month which McMullen has expressed a willingness to allow for Hoffman's services over the value of his own is the extreme sum which any fair consideration of the testimony will justify.

McMullen is entitled to an allowance of interest at eight per cent. per annum, the Oregon rate, on half the moneys drawn by Hoffman and respondent from the profit account of this work and appropriated to their own use; the interest charges to be computed from the dates of withdrawal.

We are perfectly willing to concede that the general rule is that in cases of partnership settlements interest is not to be charged on excess amounts drawn by the partners until a balance is struck between them, but there are exceptions to the rule and McMullen's case comes clearly within the exceptions.

In *Griggs' Appeal*, 62 Penn. St., 73, Sharswood, J., says on page 79:

"The fifth assignment of error is 'in charging John Gyger interest prior to the settlement of accounts between the parties.' Mr. Lindley remarks that the principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled: 1 Lindley on Partnership 649. In some cases it has been held that the period of the dissolution of a partnership is the proper time to make a rest for this purpose: *Stoughton vs. Lynch*, 2 Johns. Ch. R. 209; *Hollister vs. Barkley*, 11 N. H. 501. Judge Story has laid down a different rule. 'Interest,' he says, 'is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners, unless the parties have other-

wise agreed or acted in their partnership concerns:' *Dexter vs. Arnold*, 3 Mason 289. Vice-Chancellor Sandford, of New York, in *Beacham vs. Eckford*, 2 Sandf. Ch. R. 116, after a review of all the authorities, came to the conclusion that there is no general rule established, but that the allowance or refusal of interest depends upon the circumstances of each particular case. This seems much the safest principle to adopt in view of the confidential relation of the parties, and the variety and complication of such accounts. No unbending rule could be laid down which would not, in particular instances, work great injustice."

In *Lynch vs. DeViar*, 3 Johns. Cas., 303, it is said on page 309:

"I think the respondent is entitled to recover the interest. The proceeds of these speculations were received by the appellants in cash. The proportion due to Gardoqui was so much money in their hands, received to his use. It is a settled rule, that money received to the use of another, and improperly retained, always carries interest."

Karrick vs. Hannaman is a case in point on the matter of interest charges. The partnership was formed February 3, 1886, and was to continue until February 3, 1891. February 1, 1888, the defendant took possession of the property. January 1, 1890, the defendant sold the property and received the purchase price. The account was

not stated in court until October 5, 1891, but in the settlement the plaintiff was allowed interest from January 1, 1890, on his share of the moneys received by the defendant on that date, and which should then have been paid over. This allowance was sanctioned by the supreme court of Utah and by this court.

It is stipulated (record, p. 122) that Hoffman and respondent drew the following sums of money from the profits of this contract, omitting the sum of $15,663.30, drawn by Hoffman September 30, 1894, to repay his advances, and in addition to the amounts of $8,000 drawn December 30, 1893, and $12,000 drawn September 30, 1894, for salary:

January 31, 1895	$ 8,855.04
June 17, 1895	40,000.00
July 1, 1895	10,000.00
August 5, 1895	13,882.66
	$72,737.70

Hoffman's withdrawal of all these moneys was a declaration on his part, and it was true in fact, that they could safely be taken out of the partnership treasury. He thereupon held half of these amounts to the use of McMullen and ought to have paid it over; but instead of doing so he applied the money to his own purposes and presumably made a profit on it, wholly excluding McMullen from its use. This money was held until June 23, 1896, the date of the final decree,

most of it for more than a year, and no allowance is made to McMullen therefor.

This is not the ordinary case of the disentanglement of partnership accounts, in which interest is not usually allowed until a decree is entered settling the rights and interests of the partners; but here one partner had attempted to drive the other from the firm, had denied that he possessed any interest in it, had seized upon all of the partnership property and assets, had appropriated them to his own use, and had deliberately striven to defraud his copartner out of his property. It is a parallel case with *Karrick vs. Hannaman*, but under the circumstances attending the two partnerships a far more infamous attempt to commit a wrong, and if it was proper to allow interest in that case, it certainly is in this.

McMullen should have been allowed his costs of suit against respondent.

The rule which largely leaves the taxation of costs to the discretion of the trial court in equity cases, and the rule that in the settlement of partnership accounts costs are ordinarily chargeable against the common fund, are admitted; but we insist that the same considerations which warrant the allowance of interest against respondent demand an award of costs against her, and that it was a clear abuse of discretion on the part of the trial court to make McMullen bear any part of the costs, in the light of the findings and decree

which were made in his favor. We do not care to discuss this matter at any length, as the facts speak for themselves. That the action of the trial court in the matter of costs is reviewable here is shown by the following authorities:

In 1 Foster's Federal Practice (2 Ed.), section 326, the author says, citing decisions of this court:

"In equity, the award or denial of costs is always in the discretion of the court; and so very frequently is their amount when awarded. When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonably definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal."

In *Ex parte Robinson*, 72 Ala., 389, it is said on page 391:

"In the imposition of costs, the chancellor exercises a legal discretion, governed by precedent,

and by general rules applicable to the varying circumstances of particular cases. But this discretion is exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, and defining and declaring the rights of the parties. If from such a decree an appeal was taken, the decree as to costs would be open to modification or reversal, if in other respects there was found in it error, or that an alteration of it was just and equitable."

In *Hamer vs. Giles*, L. R., 11 Chan. Div., 942, it is said on page 944:

"It appears to me that where there is no fault on either side, but the partnership accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where an action for dissolution is rendered necessary by the misconduct of a partner—as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so—the Court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct."

In this cause the answer admits (record, p. 40) that on December 4, 1894, months before this suit was commenced, McMullen requested of Hoffman an inspection of the partnerhip books

and accounts and demanded an accounting of the firm transactions, and that Hoffman refused, and ever after refused, to render to McMullen any account or to allow him any inspection of the records. McMullen thus discharged every duty resting upon him, and Hoffman wilfully brought upon himself the litigation. When it comes to making McMullen pay a penalty for securing his rights under such circumstances we need only quote the language of Mr. Justice Miller in *Trustees vs. Greenough*, 105 U. S., 527, 538, that: "This system of paying from a man's property those engaged in the effort to wrest it from him can never receive my approval."

We submit that a fair and equitable statement of the account between these litigants, and of the amount for which McMullen should be awarded a decree, is that made in his claim (record, pp. 127-8) viz.:

Total allowed and received from city of Portland	$509,825.22	
For extra work	14,496.74	
		$524,321.96
Profits of camp, store, sale of livestock, interest, etc		15,339.76
		$539,661.72
Total gross cost of work, including salary of $8,000 to Lee Hoffman		422,622.13
Balance		$117,039.59

Amount retained by city of Portland on account of contract	$ 50,982.52	
On account of extra work	2,263.43	
		$ 53,245.95
Less amount paid Wolff, Zwicker & Buehner		18,627.17
Now held by the city of Portland		$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant		*84,737.70
		$119,356.48
Amount to be paid to San Francisco Bridge Co		2,316.89
Balance as above		$117,039.59
One-half thereof owing McMullen		58,519.80
Interest owing McMullen at the rate of 8 per cent. per annum to June 23, 1896, date of decree, as below:		
Interest on half of $4,800, excess drawn for salary on December 30, 1893, from said date		476.80

Brought Forward,	*$58,996.60*
Interest on half of $7,200, excess drawn for salary on September 30, 1894, from said date	498.40
Interest on half of $8,855.-04, drawn January 31, 1895	494.91
Interest on half of $40,000, drawn June 17, 1895	1,626,66
Interest on half of $10,000, drawn July 15, 1895	375.51
Interest on half of $13,882.-66, drawn August 5, 1895	490.45
Interest on $2,316.89, advanced by complainant, to December 30, 1893	83.80
	$62,566.33
Less interest on $17,609.91, advanced by Lee Hoffman from the several dates of advances to November 1, 1893	†419.14
Balance	$62,147.19

*This is made up of $12,000, excess salary drawn by Hoffman, added to the amount of his withdrawals stated on page 273, *supra*.

†November 1, 1893, is taken as the date when this money might have been safely withdrawn, as shown by the condition of the Hoffman & Bates bank account on that date. (See record, p. 121.)

For this amount, together with eight per cent. interest, the Oregon rate, from June 23, 1896, and costs throughout the whole course of the litigation, McMullen should have a decree.

This decree should also adjudge that McMullen is the half owner of the other assets of the firm, as was found by the trial court (record, p. 95), viz.: Plant and tools, cost price, $6,234.60; furniture and fixtures, cost price, $187.85; camp fixtures, cost price, $1,246.16; miscellaneous accounts, $188.75; disallowed claim against the city of Portland, $16,961.25.

Respectfully submitted,

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